No. 88-40-CFX
Status: GRANTED

Title: United States, Petitioner
v.
Frank S. Zolin, et al.

Docketed:
July 7, 1988

Court: United States Court of Appeals
for the Ninth Circuit

See also:
87-1705

Counsel for petitioner: Solicitor General

Counsel for respondent: Bennett,Frederick R., Lieberman,Eric M.

Entry	Date	Note	Proceedings and Orders
1	Jun 16 1988		Application for extension of time to file petition and order granting same until July 8, 1988 (O'Connor, June 20, 1988).
2	Jul 7 1988	G	Petition for writ of certiorari filed.
4	Jul 28 1988		Order extending time to file response to petition until September 12, 1988.
5	Sep 1 1988		Order further extending time to file response to petition until September 26, 1988.
7	Sep 26 1988	X	Suggestion of mootness filed by respondent Church of Scientology of CA.
8	Sep 26 1988	X	Brief of respondent Church of Scientology of CA in opposition filed.
6	Sep 28 1988		DISTRIBUTED. October 14, 1988
12	Oct 7 1988	X	Reply brief of petitioner United States filed.
11	Oct 11 1988		REDISTRIBUTED. October 14, 1988
13	Oct 17 1988		Petition GRANTED. Justice Brennan OUT.
			**********
14	Nov 22 1988		Record filed.
		*	Certified copy of original record in 4 volumes and 1 envelope of exhibits received.
16	Nov 29 1988		Order extending time to file brief of petitioner on the merits until December 15, 1988.
17	Dec 14 1988		Joint appendix filed.
18	Dec 15 1988		Brief of petitioner United States filed.
20	Dec 29 1988		Order extending time to file brief of respondent on the merits until February 1, 1989.
21	Jan 23 1989	D	Application (A88-594) by respondent to file a brief on the merits in excess of page limits, submitted to Justice O'Connor.
22	Jan 25 1989		Application (A88-594) denied by Justice O'Connor.
23	Jan 30 1989		Brief amicus curiae of Bernard M. Barrett, Jr., M.D. filed.
25	Feb 1 1989		Brief of respondent Church of Scientology of CA filed.
24	Feb 3 1989		SET FOR ARGUMENT MONDAY, MARCH 20, 1989. (4TH CASE)
26	Feb 3 1989	D	Motion of Bernard M. Barrett, Jr. for leave to participate in oral argument as amicus curiae, for divided argument and for additional time for oral argument filed.
27	Feb 8 1989		CIRCULATED.
28	Feb 14 1989		Response filed by respondents to motion of Bernard M. Barrett, Jr. for leave to participate in oral argument as amicus curiae.

No. 88-40-CFX

Entry	Date	Note	Proceedings and Orders
29	Feb 21 1989		Motion of Bernard M. Barrett, Jr. for leave to participate in oral argument as amicus curiae, for divided argument and for additional time for oral argument DENIED. Justice Brennan OUT.
30	Mar 3 1989	X	Reply brief of petitioner United States filed.
31	Mar 20 1989		ARGUED.

88-40

No.

Supreme Court, U.S.
FILED
JUL 7 1988
JOSEPH F. SPANIOL, JR.
CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1988

UNITED STATES OF AMERICA, PETITIONER

v.

FRANK S. ZOLIN, ET AL.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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QUESTIONS PRESENTED

1. Whether, in the course of an action brought by the Internal Revenue Service to enforce a summons, the court may place restrictions on the disclosure of the summoned information.

2. Whether a prima facie case for the invocation of the crime-fraud exception to the attorney-client privilege must be established by independent evidence, or, alternatively, whether the applicability of that exception can be resolved by an in camera inspection of the allegedly privileged material.

PARTIES TO THE PROCEEDING

In addition to the parties named in the caption, Mary Sue Hubbard and the Church of Scientology of California intervened in the district court and are respondents here.

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In the Supreme Court of the United States

OCTOBER TERM, 1988

No.

UNITED STATES OF AMERICA, PETITIONER

v.

FRANK S. ZOLIN, ET AL.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

The Solicitor General, on behalf of the United States of America, petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

OPINIONS BELOW

The order of the en banc court vacating the order granting rehearing (App., *infra*, 1a-9a) is reported at 842 F.2d 1135. The earlier order of the en banc court granting rehearing (App., *infra*, 10a) is reported at 832 F.2d 127. The opinion of the panel (App., *infra*, 11a-24a) is reported at 809 F.2d 1411. The March 12, 1985, interim order of the district court (App., *infra*, 30a-32a), the April 30, 1985, order of the district court (App., *infra*, 27a-29a), and the June 10, 1985, order of the district court denying reconsideration (App., *infra*, 25a-26a) are unreported.

JURISDICTION

The judgment of the court of appeals was entered on February 9, 1987. A petition for rehearing was granted on

November 6, 1987 (App., *infra*, 10a), and that order was vacated as improvidently granted on March 28, 1988 (App., *infra*, 2a). On June 20, 1988, Justice O'Connor extended the time to petition for a writ of certiorari to and including July 8, 1988. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTORY PROVISIONS INVOLVED

Section 7602 of the Internal Revenue Code of 1954 (26 U.S.C.) provides in pertinent part:

EXAMINATION OF BOOKS AND WITNESSES

(a) AUTHORITY TO SUMMON, ETC.—For the purpose of ascertaining the correctness of any return, making a return where none has been made, determining the liability of any person for any internal revenue tax or the liability at law or in equity of any transferee or fiduciary of any person in respect of any internal revenue tax, or collecting any such liability, the Secretary is authorized—

(1) To examine any books, papers, records, or other data which may be relevant or material to such inquiry;

(2) To summon the person liable for tax or required to perform the act, or any officer or employee of such person, or any person having possession, custody, or care of books of account containing entries relating to the business of the person liable for tax or required to perform the act, or any other person the Secretary may deem proper, to appear before the Secretary at a time and place named in the summons and to produce such books, papers, records, or other data, and to give such testimony, under oath, as may be relevant or material to such inquiry; and

(3) To take such testimony of the person concerned, under oath, as may be relevant or material to such inquiry.

* * * * *

Section 7604(a) of the Internal Revenue Code of 1954 (26 U.S.C.) provides in pertinent part:

ENFORCEMENT OF SUMMONS.

(a) JURISDICTION OF DISTRICT COURT—If any person is summoned under the internal revenue laws to appear, to testify, or to produce books, papers, records, or other data, the United States district court for the district in which such person resides or is found shall have jurisdiction by appropriate process to compel such attendance, testimony, or production of books, papers, records, or other data.

* * * * *

Section 7421(a) of the Internal Revenue Code of 1954 (26 U.S.C.) provides in pertinent part:

PROHIBITION OF SUITS TO RESTRAIN ASSESSMENT OR COLLECTION

(a) TAX.—Except as provided in sections 6212(a) and (c), 6213(a), 6672(b), 6694(c), and 7426(a) and (b)(1), and 7429(b), no suit for the purpose of restraining the assessment or collection of any tax shall be maintained in any court by any person, whether or not such person is the person against whom such tax was assessed.

* * * * *

STATEMENT

1. In July 1984, the Criminal Investigative Division of the Internal Revenue Service (IRS) began investigating the

tax returns of L. Ron Hubbard and others for tax years 1979-1983. Prior to the commencement of the investigation, Los Angeles newspapers had reported that former officials of the Church of Scientology had testified in *Church of Scientology* v. *Gerald Armstrong*, No. C 420 153 (Cal. Super. Ct.), that various Church of Scientology entities had transferred millions of dollars to Hubbard in the late 1970s and early 1980s. In October 1984, the IRS served an administrative summons on the Clerk of the California Superior Court, an office now occupied by respondent Zolin, seeking a number of documents contained in the record of the *Armstrong* case. The Clerk's office produced some of the documents, but it refused to produce 13 documents that had been ordered sealed by the Superior Court. The government then initiated this proceeding in the United States District Court for the Central District of California to enforce the summons. App., *infra*, 12a.

Respondents Mary Sue Hubbard and Church of Scientology intervened to oppose enforcement of the summons. They contended, inter alia, that the summons had been issued for the improper purpose of gathering information for use by other government agencies. After an evidentiary hearing, the district court rejected this contention. The court stated that the "Church has failed to raise any doubt of the good faith of the Internal Revenue Service in pursuing this summons enforcement proceeding" (App., *infra*, 27a). The court explained that the summons was validly issued pursuant to a bona fide criminal tax investigation of L. Ron Hubbard and that "the agent issuing the summons was in good faith in doing so, and did not do so for an improper purpose, or to harass the taxpayer, or for a collateral purpose" (*ibid.*). The court therefore enforced the summons in part, ordering production of the five disputed

documents that it found to be relevant and not privileged (*id.* at 28a).

The court's order further provided that the documents produced "shall not be delivered to any other government agency by the IRS unless criminal tax prosecution is sought or an Order of Court is obtained" (App., *infra*, 29a). In denying the government's subsequent motion for reconsideration, the court explained this restriction as follows (*id.* at 26a): "Since the entire basis of the summons proceeding was to obtain material for a tax investigation, the court thinks it reasonable to restrict the use of the material for that purpose, unless a criminal prosecution is instituted. If exigencies of other litigation make it necessary, the IRS is free to make its case for an exception to this court."

The court also denied enforcement of the summons in part, ruling that eight of the documents were either irrelevant or privileged. In particular, the court ruled that Exhibit 5C, tape recordings of two meetings between various attorneys and representatives of L. Ron Hubbard and the Church of Scientology that are known as the "MCCS tapes," was protected by the attorney-client privilege. The government argued that the "crime-fraud" exception to the attorney-client privilege was applicable,[1] relying on affidavits from a special agent that contained partial transcripts of the tapes and that stated that the excerpts and his discussions with former Church employees had

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[1] It is well established that the attorney-client privilege does not protect communications made in furtherance of a crime or fraud. To invoke this exception, there must be a prima facie showing that the client was engaged in or planning criminal or fraudulent conduct and that the attorney's advice was in furtherance of or closely related to the criminal or fraudulent activity. See, *e.g.*, *Clark* v. *United States*, 289 U.S. 1, 15-16 (1933); *In re Grand Jury Investigation*, 842 F.2d 1223, 1226-1227 (11th Cir. 1987).

given the agent reason to believe that the meetings were part of a criminal conspiracy to defraud the United States (see App., *infra*, 23a-24a, 28a).[2] The court found that the government had not demonstrated the applicability of the crime-fraud exception, stating that "[t]he quoted excerpts tend to show or admit past fraud but there is no clear indication that future fraud or crime is being planned" (*id.* at 28a). The government sought reconsideration on the ground that the court should not have rejected the applicability of the exception without an in camera inspection of the complete tapes. The court denied the motion (App., *infra*, 25a-26a).[3]

2. A panel of the court of appeals affirmed (App., *infra*, 11a-24a). The court rejected the government's conten-

[2] The affidavits alleged that the taped meetings, part of the MCCS (Mission Corporate Category Sortout) Project, "focused generally on the intentional violation of the tax laws," specifically, "(i) a proposed scheme whereby the Church's cash transfers to Hubbard would be disguised as payments for services rendered (allegedly to insulate Hubbard from tax liability and to protect the Church's tax-exempt status), and (ii) a proposed scheme whereby Hubbard would be able to control royalty income * * * without that control being traceable to him" (App., *infra*, 23a-24a).

[3] The court stated that, "[w]hile * * * at one time [listening to the tapes in toto was] discussed with counsel, thereafter Mr. Petersell's declaration was submitted, and no one suggested that this was an inadequate basis on which to determine the attorney-client privilege question" (App., *infra*, 25a-26a). In fact the pleadings filed with the court together with the Petersell declarations on March 8 and 15, 1985, specifically requested the court to listen to the tapes themselves if the court concluded that the partial transcripts and the special agent's declarations did not sufficiently demonstrate the applicability of the crime-fraud exception. See Mar. 8, 1985 Government's Response to Intervenor's Opposition at 6; Mar. 15, 1985, Petitioner's Memorandum in Response to Court's Request and for Partial Reconsideration of Interim Ruling at 11. The court of appeals did not address the question of the sufficiency of the in camera showing because it concluded that the contents of the tapes themselves could not be used to demonstrate the applicability of the crime-fraud exception (see pages 7-8, *infra*).

tion that the district court had exceeded its authority in a summons enforcement proceeding by imposing limitations on the IRS regarding disclosure of the summoned information (*id.* at 18a-19a). Relying on its prior decision in *United States* v. *Author Services, Inc.*, 804 F.2d 1520, 1525 (9th Cir. 1986), which in turn had relied upon *United States* v. *Texas Heart Inst.*, 755 F.2d 469, 481 (5th Cir. 1985), the court concluded that "[a] district court may, when appropriate, condition enforcement of a summons on the IRS's agreeing to abide by disclosure restrictions" (App., *infra*, 19a).

The panel also affirmed the trial court's ruling that the crime-fraud exception was not applicable to the MCCS tapes (App., *infra*, 21a-24a). Citing *United States* v. *Shewfelt*, 455 F.2d 836 (9th Cir.), cert. denied, 406 U.S. 944 (1972), the panel explained that circuit precedent had established the rule that the crime-fraud exception could be invoked to justify disclosure of otherwise privileged communications only where the government establishes " 'a prima facie case of fraud *independently* of said communications' " (App., *infra*, 21a, quoting 455 F.2d at 840 (emphasis in original)). While noting that "*Shewfelt*'s independent evidence requirement ha[d] been strongly criticized" and rejected by other courts, and that another Ninth Circuit decision, *United States* v. *Friedman*, 445 F.2d 1076, cert. denied, 404 U.S. 958 (1971), had "implicitly recognized that a district court may examine the disputed communications themselves in order to determine the applicability of the 'crime-fraud' exception," the panel concluded that it was bound to follow the independent evidence rule of *Shewfelt* unless that case was overruled en banc (App., *infra*, 22a-23a). Applying that rule, the panel concluded that the independent evidence in this case, consisting of the special agent's declarations describing his conversations with certain former Church employees (but

not the partial transcripts of the tapes), "while not altogether insubstantial, [was] not sufficient to make out the requisite prima facie showing of intended illegality" (*id.* at 23a-24a).

3. The court of appeals ordered the case reheard en banc (App., *infra*, 10a). Following supplemental briefing and oral argument, however, the en banc court entered an order vacating "as improvidently granted" the previous order granting rehearing en banc (*id.* at 1a-2a). The order explained that there was no conflict between *United States* v. *Shewfelt, supra*, and *United States* v. *Friedman, supra,* because *Friedman* did not discuss whether there was an independent evidence requirement. The en banc court confirmed that *Shewfelt* was the law of the circuit on this point, holding that "the government must make a prima facie showing, independent of the communications involved, that the attorney-client communications were in furtherance of an intended or present illegality" (App., *infra*, 2a). The en banc court also ordered withdrawn the six paragraphs in the panel opinion that had noted and discussed the criticisms of *Shewfelt* (see App., *infra*, 21a-23a). *Id.* at 2a.

Three judges dissented from the en banc court's order, arguing that rehearing en banc had not been improvidently granted and that the en banc court should overrule *Shewfelt* (App., *infra*, 2a-9a). The dissenters criticized the majority for "perpetuat[ing] a maverick version of the attorney-client privilege" that "clashes with that of a majority of other circuits," noting that "the attorney-client privilege, as a rule of evidence for the federal courts, has an overriding need for national uniformity" (*id.* at 3a). The dissenters noted that "[e]very circuit to face the situation this case presents has allowed in camera inspection," citing cases from six different courts of appeals (*id.* at 4a).

The dissenters then discussed the merits of the independent evidence rule (*id.* at 4a-8a) and concluded that they "would overrule *Shewfelt*, eliminate the independent evidence requirement, and allow in camera inspection of suspect communications" (*id.* at 8a).

REASONS FOR GRANTING THE PETITION

This case presents two distinct questions that are of considerable importance to the exercise of the IRS's summons authority and on each of which there exists a direct conflict in the circuits. First, the court of appeals' holding that it is appropriate in a summons enforcement proceeding for a district court to impose limitations on the dissemination by the IRS of the summoned information poses a serious threat to the expeditious enforcement of summonses. This Court has recognized that summons enforcement proceedings should be summary in nature and limited to the determination of the IRS's right to obtain needed information. See *Donaldson* v. *United States*, 400 U.S. 517, 529 (1971); *United States* v. *Powell*, 379 U.S. 48, 57-58 (1964). The expansion of the scope of summons enforcement proceedings sanctioned by the court of appeals here substantially departs from that model by prolonging the proceedings and by interjecting into them extraneous and difficult issues concerning the allowable scope of IRS disclosures of tax return information.

Second, the court of appeals' "maverick" (App., *infra*, 3a) approach to the crime-fraud exception poses a serious practical obstacle to the invocation of that exception because independent evidence that an attorney-client communication involves a crime or a fraud often will not be available. The result is that communications that, upon examination, would reveal themselves to be clearly outside the scope of the attorney-client privilege nevertheless will be withheld from government investigators.

Thus, two separate aspects of the decision below threaten to create severe obstacles for the IRS in conducting its tax investigations. Because each of these important holdings directly conflicts with decisions of other courts of appeals, this Court should grant certiorari to resolve the conflicts.

1. a. The decision below, and the Ninth Circuit's prior decision in *United States* v. *Author Services, Inc.*, 804 F.2d 1520, 1525-1526 (1986), on which the court below relied, directly conflict with the rule adopted by the Fifth Circuit en banc in *United States* v. *Barrett*, 837 F.2d 1341 (1988), petition for cert. pending, No. 87-1705. *Author Services* involved another IRS summons issued in the course of the same tax investigation involved in the present case. The court enforced the summons, but it also upheld the portion of the district court's order that prohibited the IRS from delivering the summoned documents to any agency or individual without a court order, unless a criminal tax prosecution was being sought. The court of appeals found that this condition was justified because the many levels of ongoing litigation between the Church of Scientology and the government had given the district court the "fear 'that information acquired for one purpose may be in effect used for civil discovery in the other' " (804 F.2d at 1526). The court of appeals concluded that the imposition of conditions upon disclosure of summoned information is justified by the court's "broad authority, under 26 U.S.C. § 7402(a) (1982), to issue any orders or decrees 'as may be necessary or appropriate for the enforcement of the internal revenue laws' " (804 F.2d at 1525); on the facts there, the court concluded that the condition imposed by the district court was "a wise exercise of control, serving the interests of judicial economy" (*id.* at 1526). Here, the court of appeals simply followed *Author Services* in upholding the same condition upon the

disclosure of information obtained pursuant to another summons issued in the course of the same investigation of the Church of Scientology (App., *infra*, 19a).

The Ninth Circuit's decisions allowing the conditional enforcement of summonses cannot be reconciled with the rule established in the Fifth Circuit. The latter court originally reached the same conclusion as the Ninth Circuit on this issue in *United States* v. *Texas Heart Inst.*, 755 F.2d 469 (5th Cir. 1985), and, indeed, that decision was cited by the Ninth Circuit both in *Author Services* (804 F.2d at 1525) and in the present case (App., *infra*, 19a). In *Texas Heart*, pursuant to a criminal tax investigation of Dr. Bernard Barrett, the IRS had issued summonses to several hospitals seeking lists of Dr. Barrett's patients. All but four of the hospitals complied with the summonses. The IRS then sent form letters to each of the patients stating that Dr. Barrett was under investigation by the IRS and requesting information about the fees paid to him. In an action brought by the IRS to enforce the summonses issued to the four hospitals that had not complied, the district court refused to enforce the summonses, objecting in part to the form letters that were being sent to the patients whose identities were divulged by the hospitals. The court of appeals reversed and ordered the summonses enforced, holding, inter alia, that Barrett's assertion that the IRS had violated 26 U.S.C. 6103 in disclosing to his patients that he was under investigation provided no basis for doubting the IRS's good faith in issuing the summonses and therefore no basis for not enforcing them.[4]

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[4] Section 6103(a) generally prohibits the IRS from disclosing tax "return information" except in the circumstances specifically permitted by that section. See generally *Church of Scientology* v. *IRS*, No. 86-472 (Nov. 10, 1987), slip op. 1-3. Section 6103 then sets forth in considerable detail the circumstances under which such disclosures are authorized to certain identified parties, including specified govern-

The court added, however, that if the district court determined that improper disclosures had been made to the patients, the "enforcement of the summonses may be conditioned on an IRS agreement to cease such improper disclosures" (755 F.2d at 481).

The Fifth Circuit, however, has specifically overruled *Texas Heart*, and its rule is now in direct conflict with that of the Ninth Circuit. *United States* v. *Barrett*, 804 F.2d 1376 (1986), rev'd en banc, 837 F.2d 1341 (1988), petition for cert. pending, No. 87-1705, involved another summons in the same investigation, which was addressed to Barrett's professional corporation. The panel, concluding that it was bound by *Texas Heart*, ordered the district court to consider whether the summons should be conditionally enforced. The full court granted the government's petition for rehearing en banc, however, and affirmed the district court's decision to enforce the summons unconditionally. The en banc court held that a district court lacks the power to impose conditions upon the enforcement of a summons, and it explicitly overruled both *Texas Heart* (837 F.2d at 1351) and an earlier decision, *Dunn* v. *Ross*, 356 F.2d 664 (5th Cir. 1966), to the extent that it could be read "to endorse the district court's ability to conditionally enforce a summons" (837 F.2d at 1350).

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ment agencies, congressional committees, and representatives of a taxpayer. See 26 U.S.C. 6103(c)-(o). The information that Barrett was under investigation falls within the definition of "return information" that is protected by Section 6103. The government's position was that the disclosure in the letters was authorized by 26 U.S.C. 6103(k)(6), which permits the disclosure of return information "to the extent * * * necessary in obtaining information" in connection with an audit or other investigation related to the enforcement of the revenue laws.

The conflict between the Fifth and Ninth Circuits on this issue could not be clearer.[5] In *Author Services*, the Ninth Circuit rejected the government's contention that "the court is limited to either enforcing a summons or denying enforcement," stating that "[c]learly this is not the case" (804 F.2d at 1525). By contrast, the en banc court in *Barrett* explicitly held that, "[i]n a summons enforcement proceeding, the district court's only task is to determine whether the summons should or should not be enforced" (837 F.2d at 1350). And the court of appeals here expressly held that, in the Ninth Circuit, "[a] district court may, when appropriate, condition enforcement of a summons on the IRS' agreeing to abide by disclosure restrictions" (App., *infra*, 19a). The *Barrett* court held, to the direct contrary, that "[t]he district court does not have the power to conditionally enforce the summons" (837 F.2d at 1350).

b. Because the question of the power of a district court to place conditions on the enforcement of a summons has a substantial effect on the IRS's ability to conduct its investigations, it is important that the conflict in the circuits on this point be resolved. It is well established that summons enforcement proceedings are designed to be "summary" in nature. *Donaldson* v. *United States*, 400 U.S. at 529; see also, *e.g.*, *United States* v. *Rylander*, 460 U.S. 752, 756 (1983); *United States* v. *Kis*, 658 F.2d 526, 535-536 (7th Cir. 1981); *United States* v. *Davis*, 636 F.2d 1028, 1038 (8th Cir.), cert. denied, 454 U.S. 862 (1981); M. Saltzman, *IRS Practice and Procedure* ¶ 13.04, at 13-25 to 13-27 (1981). An expeditious mechanism for enforcement is essential because delay can seriously interfere with

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[5] Indeed, the en banc Fifth Circuit in *Barrett* expressly acknowledged (837 F.2d at 1351 n.11) the contrary Ninth Circuit decisions in *Author Services* and in the present case.

the IRS's exercise of its investigative authority. Thus, this Court has limited the right of taxpayers to intervene in summons enforcement proceedings (*Donaldson* v. *United States, supra*), "apparently out of concern for the ability of a taxpayer to delay the investigative process by forcing protracted enforcement proceedings" (M. Saltzman, *supra,* at 13-25). And the Court has rejected the introduction into summons enforcement proceedings of issues going beyond the traditional inquiry into "institutional good faith," noting that the additional inquiries would cause "undesirable" delays. *United States* v. *LaSalle Nat'l Bank,* 437 U.S. 298, 316 (1978). Congressional enactments stimulated by those decisions have been responsive to the same concerns. See 26 U.S.C. 7602(c), 7609(c); S. Rep. 97-494, 97th Cong., 2d Sess. 285 (1982); H.R. Rep. 94-658, 94th Cong., 2d Sess. 309 (1976).

The decision of the court of appeals ignores this clearly established statutory policy to avoid delay, and it therefore poses a serious threat to the IRS's ability to conduct efficient tax investigations. As the court of appeals frankly acknowledged (App., *infra,* 19a), "[t]he district court's order in this case created a mechanism whereby the district court could monitor the IRS' use of the summoned documents." Thus, far from the "summary" enforcement proceeding, the court of appeals has sanctioned a procedure under which the IRS's investigation will be subject to constant scrutiny and attack by the summoned party. In the context of a criminal investigation, litigation over IRS summonses typically is a struggle between the government's efforts to obtain information in a timely fashion and the taxpayer's attempts to delay the investigation. Allowing taxpayers to litigate hypothetical or anticipatory disclosure questions in summons enforcement proceedings would lead to the courts' repeated involvement at each new step of the investigation, which has the

potential to cause significant delays while the courts supervise the government's use of the summoned material.[6] Thus, if permitted to stand, the court of appeals' decision would have deleterious effects on the enforcement of the tax laws because it would " 'stultify' and unduly delay the investigation sought by the IRS" into violations of those laws. *United States* v. *Ernst & Whinney,* 750 F.2d 516, 520 (6th Cir. 1984) (quoting *Donaldson* v. *United States,* 400 U.S. at 531).

c. The decision below is erroneous. This Court has repeatedly emphasized that the role of the judiciary in a summons enforcement action is a limited one—to guard against abuses of the power to summon documents or testimony. See, *e.g., United States* v. *Bisceglia,* 420 U.S. 141, 150 (1975); *United States* v. *Powell,* 379 U.S. at 57-58. That role plainly does not encompass supervising the investigation and the manner in which the IRS uses the summoned material. The summons power, of course, is not absolute; as this Court made clear in *Powell,* the court may refuse to enforce the summons if it finds that it was not issued in good faith—*i.e.,* if the summons is not relevant to an investigation conducted pursuant to a legitimate purpose. *Id.* at 58. If a summons meets that good faith threshold, however, the Court has consistently held that restrictions on the IRS's summons authority should not be imposed " 'absent unambiguous directions from Congress.' " *United States* v. *Arthur Young & Co.,* 465 U.S. 805, 816 (1984) (quoting *United States* v. *Bisceglia,* 420 U.S. at 150).

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[6] The actual litigation that would ensue in the course of this "monitoring" of the investigation would likely be protracted because it would often center upon complex and difficult questions of interpreting 26 U.S.C. 6103, particularly the scope of the subsection authorizing disclosure when necessary for law enforcement purposes (Section 6103(k)(6)).

Here, both courts below agreed that the summons met the *Powell* standards and should be enforced. And the courts did not suggest that any future disclosures by the IRS would create any question about the good faith of the investigation; despite the Church's allegations that other government agencies were concerned with its operations, the district court found that the Church had "failed to raise any doubt of the good faith of the Internal Revenue Service in pursuing this summons enforcement proceeding" (App., *infra*, 27a). This conclusion was clearly correct because the question of good faith in issuing a summons (*i.e.*, whether it is issued in aid of an investigation conducted pursuant to a legitimate purpose) is wholly independent of the question whether the IRS has made disclosures that violate Section 6103. As one court of appeals has stated in rejecting a similar objection to enforcement of a summons on the ground that there had been Section 6103 violations, evidence of unlawful disclosures "does not reflect on the good faith of the investigation itself" (*United States* v. *Balanced Fin. Mgmt., Inc.*, 769 F.2d 1440, 1448 (10th Cir. 1985)). See also *United States v. Chemical Bank*, 593 F.2d 451, 456 (2d Cir. 1979).[7]

The Fifth Circuit correctly stated in *Barrett* that the court's role in a summons enforcement proceeding is limited to determining whether the summons was issued in good faith and "[t]here is no statutory authority, nor congressional indication that existing statutes supply the authority, nor Supreme Court authority, to allow the district court to make any consideration except whether to

[7] By the same token, the courts of appeals have held that the question whether the IRS has complied with the provisions of the Privacy Act, 5 U.S.C. 552a, is irrelevant to whether a summons should be enforced. *United States* v. *McAnlis*, 721 F.2d 334, 337 (11th Cir. 1983), cert. denied, 467 U.S. 1227 (1984); *United States* v. *Berney*, 713 F.2d 568, 572-573 (10th Cir. 1983).

enforce or not to enforce the summons" (837 F.2d at 1350). The apparent purpose of the conditions on disclosure imposed by the district court here was to ensure that the IRS would not violate the confidentiality protections of Section 6103 in its future use of the summoned material; in the words of the court of appeals, the enforcement order established "a mechanism whereby the district court could monitor the IRS's use of the summoned documents" (App., *infra*, 19a). But Congress established a remedial framework for enforcing Section 6103, and there is no reason to conclude that those remedies are inadequate when the documents in question have been obtained by means of a summons. Therefore, the court below erred in interfering with the established, summary nature of summons enforcement proceedings in an effort to augment judicially the statutory framework for enforcing Section 6103.

Congress created both a civil damage remedy for violations of Section 6103 (see 26 U.S.C. 7431) and criminal sanctions against federal employees who make unlawful disclosures (see 26 U.S.C. 7213(a)). But Congress did not provide a means for an individual to seek injunctive relief against possible future violations of Section 6103.[8] Thus, if a person believes that the IRS is planning to make an unlawful disclosure of confidential tax return information that he supplied to the agency, he cannot bring suit to

[8] 26 U.S.C. 6110 authorizes disclosure and public inspection of certain "written determination[s]," including private letter rulings. That provision requires the IRS to give pre-disclosure notice to persons to whom the determination pertains, and it gives those persons, if they object to the IRS's failure to make a deletion in order to preserve their confidentiality, the right to seek a pre-disclosure determination in the Tax Court of their right to such a deletion (Section 6110(f)(3)). There is no analogous right to go to court to challenge a proposed disclosure under Section 6103.

enjoin or prevent that disclosure; rather, he is limited to the remedy provided by Congress of seeking damages, if, in fact, such a disclosure actually occurs. There is no reason why a different rule should obtain where the confidential information was obtained by means of a summons. If the summons meets the traditional criteria for enforcement, then the district court is obliged to enforce it and order the material turned over to the IRS. The investigation should not be delayed while the court embarks on a course of litigation (and presumably appellate litigation) about whether certain conditions should or should not be included in the particular enforcement order. Nor is the court empowered to monitor the IRS's investigation to prevent the disclosure of that material in violation of Section 6103; rather, if such a disclosure occurs, the aggrieved person may invoke the remedies provided by Congress.

Indeed, the condition imposed by the courts in this case on enforcement of the summons violates the specific restrictions of the Tax Anti-Injunction Act, 26 U.S.C. 7421(a). That statute generally withdraws jurisdiction from the courts to hear suits for the "purpose of restraining the assessment or collection of any tax," and it has been broadly construed to apply to any IRS activity necessary to determine tax liability, including investigative activity. Thus, the courts have held that the Act applies to bar "a taxpayer seeking to enjoin the IRS from acquiring or using the information necessary" to determine tax liability. *United States* v. *First Family Mortgage Corp.*, 739 F.2d 1275, 1278 (7th Cir. 1984). See, *e.g.*, *Lowrie* v. *United States*, 824 F.2d 827, 830-831 (10th Cir. 1987); *Black* v. *United States*, 534 F.2d 524, 526-527 (2d Cir. 1976); see also *Bob Jones Univ.* v. *Simon*, 416 U.S. 725, 738-739 (1974). This case falls within the proscription of the Anti-Injunction Act. The district court has restrained the IRS's conduct of its investigation by enjoining it

(pending a further court order) from making full use of material that is lawfully in it its possession pursuant to a valid summons.

2. a. The court of appeals' restrictive view of the crime-fraud exception to the attorney-client privilege directly conflicts with the prevailing rule in the other courts of appeals. The en banc court in this case stated unequivocally that *United States* v. *Shewfelt*, 455 F.2d 836 (9th Cir.), cert. denied, 406 U.S. 944 (1972), remains the law of the Ninth Circuit. In *Shewfelt*, the court had stated that "before the privileged status of [attorney-client] communications can be lifted, the government must first establish a prima facie case of fraud *independently* of the said communications" (455 F.2d at 840 (emphasis added)), and the court restated that rule in essentially the same terms in this case (App., *infra*, 2a). As the dissenters from the en banc ruling stated, this independent evidence requirement has never been adopted by another court of appeals and constitutes "a maverick version of the attorney-client privilege" that "clashes with that of a majority of other circuits" (*id.* at 3a).

The Eighth Circuit explicitly rejected the *Shewfelt* rule in *In re Berkley & Co.*, 629 F.2d 548 (1980). The company from which documents had been subpoenaed by a grand jury in that case had relied on *Shewfelt* in arguing that independent evidence of crime or fraud was necessary to defeat its claim of attorney-client privilege. The Eighth Circuit flatly rejected that claim, noting that "[t]he cases relied on in *Shewfelt* * * * do not support the independent evidence restriction" (629 F.2d at 553 n.9). Moreover, as the dissenters in this case stated (App., *infra*, 4a), several other courts of appeals have approved in camera inspection of the documents in question in order to determine the applicability of the crime-fraud exception. See, *e.g.*, *In re Antitrust Grand Jury*, 805 F.2d 155, 168-169 (6th Cir.

1986); *In re Sealed Case*, 754 F.2d 395, 400 (D.C. Cir. 1985); *In re John Doe Corp.*, 675 F.2d 482, 490 (2d Cir. 1982); *In re Special Sept. 1978 Grand Jury II*, 640 F.2d 49, 59-61 (7th Cir. 1980); *In re Grand Jury Proceedings (FMC Corp.)*, 604 F.2d 798, 800 (3d Cir. 1979); *Union Camp Corp.* v. *Lewis*, 385 F.2d 143, 144 (4th Cir. 1967); see also *In re Sealed Case*, 676 F.2d 793, 815 (D.C. Cir. 1982) (footnote omitted) (opinion of Wright, J.) ("the subpoenaed material itself may provide *prima facie* evidence of a [crime or fraud]"). The rule reaffirmed by the Ninth Circuit in this case necessarily rejects the use of in camera inspection and cannot be squared with these decisions.

b. The Ninth Circuit clearly erred in adopting a rule that prevents the invocation of the crime-fraud exception unless the government can produce independent evidence that the communication in question relates to a crime or a fraud. Analysis of the issue points inexorably to the conclusion that the applicability of the crime-fraud exception may be demonstrated by an in camera inspection of the communication in question. The purpose of the attorney-client privilege is "to encourage full and frank communication between attorneys and their clients and thereby promote broader public interests in the observance of law and administration of justice" (*Upjohn Co.* v. *United States*, 449 U.S. 383, 389 (1981)). The privilege applies where it is necessary to achieve its purpose, but it does not absolutely apply to all communications between attorney and client. See *Fisher* v. *United States*, 425 U.S. 391, 403 (1975). In particular, it does not apply when a client consults an attorney for advice in carrying on a contemplated or ongoing crime or fraud. See *Clark* v. *United States*, 289 U.S. 1, 15-16 (1933). In such a case, the communication is not designed to promote "the observance of law and administration of justice" (*Upjohn Co.* v. *United States*, 449 U.S. at 389), but to subvert it; extending a privilege to this

type of communication would not advance any desirable policy and would deny to the courts what may be highly probative evidence.

Thus, when an attorney-client communication is related to criminal or fraudulent activity, it is not privileged and should not be treated as if it were. This is equally true whether the relation to crime or fraud can be demonstrated only by examination of the communciation itself or whether it can also be shown by evidence independent of such examination. There is no rationale for a rule that would apply the crime-fraud exception to the privilege only in the latter case, but not in the former, and the Ninth Circuit makes no attempt either in this case or in *Shewfelt* to justify such a rule. The validity of many kinds of claims of privilege is commonly resolved by means of an in camera examination, and there is no reason why utilization of that procedure is any less appropriate when the issue is the applicability of the crime-fraud exception. See, *e.g.*, *Kerr* v. *United States Dist. Court*, 426 U.S. 394, 405-406 (1976); *United States* v. *Nixon*, 418 U.S. 683, 713-714 (1974); *Halkin* v. *Helms*, 598 F.2d 1, 5-6 (D.C. Cir. 1978).

This Court's recent decision in *Bourjaily* v. *United States*, No. 85-6725 (June 23, 1987), further undermines any argument for the independent evidence requirement. There, the Court concluded that a previously-recognized independent evidence requirement for invocation of the co-conspirator hearsay exception (Fed. R. Evid. 801(d)(2)(E)) is no longer good law in modern practice under the Federal Rules of Evidence. The Court explained that there is no reason to exclude any probative evidence from the determination whether the exception should apply and that this approach is embodied in the language of

the new Rules (see Rule 104(a)).[9] The present case is an even stronger one for rejection of an independent evidence requirement than was *Bourjaily*. The independent evidence rule there was supported to some extent by the fact that the evidence whose admissibility was in doubt was hearsay and thus presumptively unreliable; it was arguable, therefore, that hearsay should not be viewed as probative evidence on the question whether the exception should apply. Here, by contrast, there is no doubt as to the reliability of the evidence; in camera examination of the disputed communication is often the *most reliable* way of determining whether it is related to a crime or a fraud. See, *e.g.*, *In re Antitrust Grand Jury*, 805 F.2d at 168. Moreover, the independent evidence rule at issue in *Bourjaily* had been fairly well established prior to the promulgation of the Rules of Evidence; here, by contrast, the Ninth Circuit's rule that independent evidence is required for in-

[9] The Federal Rules of Evidence do not govern the outcome here because Congress decided to leave to the common law evidentiary rules related to privileges, rather than to address them directly in the Rules. See Fed. R. Evid. 501. It is noteworthy, however, that the proposed rules that had been drafted to address questions of privilege clearly demonstrate that the Ninth Circuit's independent evidence rule is not supported by prior law. Proposed Rule of Evidence 5-03(d) set forth several exceptions to the attorney-client privilege, including the crime-fraud exception (Proposed Rule of Evidence 5-03(d)(1)), which were described by the drafters of the rules as "incorporat[ing] well established exceptions." 46 F.R.D. 251, 256 (1969). The Advisory Committee's Note on the crime-fraud exception specifically stated that "[n]o preliminary finding that sufficient evidence aside from the communication has been introduced to warrant a finding that the services were sought to enable the commission of a wrong is required" (*id.* at 256). Thus, the Ninth Circuit's independent evidence rule is at odds with the established common law practice in administering the crime-fraud exception.

vocation of the crime-fraud exception is at odds with prior law and the rule in other circuits.

If permitted to stand, the decision below would significantly impair IRS investigations (and other law enforcement investigations) in the Ninth Circuit. The actual contents of an attorney-client communication will often be the best evidence of whether the crime-fraud exception is applicable. Thus, permitting in camera inspection of such communications is the-most precise and efficient way of determining whether the claim of attorney-client privilege should be upheld. Moreover, in many cases, the contents of the communication will be the only evidence of whether it is related to crime or fraud. Accordingly, as one district court in the Ninth Circuit stated in declining to follow *Shewfelt*, the independent evidence rule, "in most instances, simply serve[s] to insulate dishonest attorneys from prosecution for obstruction of justice." *United States* v. *King*, 536 F. Supp. 253, 262 (C.D. Cal. 1982). See also App., *infra*, 5a. Probative evidence of crimes would be denied to investigators for no reason, since it is undisputed that protection of an attorney-client communication that is related to crime or fraud does not advance the purposes of the privilege. In light of the harmful consequences of the Ninth Circuit's independent evidence requirement, the fact that most courts of appeals have concluded that such a requirement is unnecessary and inappropriate, and the desirability of a uniform rule on this important evidentiary question of nationwide application, this Court should resolve the conflict in the circuits and harmonize the Ninth Circuit's approach to the crime-fraud exception with the rule prevailing in other courts of appeals.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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JULY 1988

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 85-6065
85-6105
D.C. No. CV85-440-HLH

UNITED STATES OF AMERICA,
PETITIONER/APPELLEE/CROSS-APPELLANT

v.

FRANK S. ZOLIN, RESPONDENT/APPELLEE

AND

CHURCH OF SCIENTOLOGY OF CALIFORNIA AND MARY SUE HUBBARD, INTERVENORS/APPELLANTS/CROSS-APPELLEES

ORDER AND DISSENT

Order Filed March 28, 1988

Before: BROWNING, Chief Judge, ANDERSON, TANG, PREGERSON, ALARCON, NORRIS, REINHARDT, BEEZER, BRUNETTI, THOMPSON AND LEAVY, Circuit Judges.

Dissent by Judge BEEZER

ORDER

En banc review was ordered in this matter under the mistaken assumption that *United States v. Shewfelt,* 455 F.2d 836 (9th Cir. 1972) and *United States v. Friedman,* 445 F.2d 1076 (9th Cir. 1971) were in conflict on the question whether "the government must first establish a prima facie case of fraud independently of the said

[attorney-client] communications," *Shewfelt,* 455 F.2d at 840, before "the privileged status of these communications can be lifted." *Id.* There is no conflict. In *United States v. Friedman*, we did not discuss the showing that the government must make *before* the trial court can examine attorney-client communications to determine whether "the thrust of these . . . conversations was to effectuate a plan of fraud." *Shewfelt,* 455 F.2d at 840. In *Shewfelt* we did, and concluded that the government must make a prima facie showing, independent of the communications involved, that the attorney-client communications were in furtherance of an intended or present illegality. *Id. Shewfelt* is the law of the circuit.

The dictum in *United States v. King,* 536 F. Supp. 253 (C.D. Cal. 1982) suggesting that *Shewfelt* "does not now appear to be the law in the Ninth Circuit," *id.* at 262, is disapproved. That portion of the three-judge panel opinion in *United States v. Zolin*, 809 F.2d 1411 (9th Cir. 1987), beginning with the first full paragraph on page 1418 to and including the last full paragraph in the second column on the same page, is ordered withdrawn. The opinion of the three-judge panel will stand in all other respects.

The order dated November 6, 1987, that this matter be reheard en banc, is vacated as improvidently granted.

BEEZER, Circuit Judge, with whom ANDERSON and THOMPSON, Circuit Judges, join, dissenting:

The order that this matter be reheard en banc was not improvidently granted. I dissent.

According to Ninth Circuit Rule 35-1, our order to rehear the matter en banc was entirely appropriate.[1] The independent evidence requirement is a procedure for in-

[1] Ninth Circuit Rule 35-1 states, "When the opinion of a panel directly conflicts with an existing opinion by another court of appeals and substantially affects a rule of national application in which there is an overriding need for national uniformity, the existence of such conflict is an appropriate ground for suggesting a rehearing en banc."

voking the crime-fraud exception to the attorney-client privilege. We adopted this procedure, in a conclusory way, in *United States v. Shewfelt,* 455 F.2d 1076, 1080 (9th Cir. 1972). This procedure has not been endorsed by any other circuit court of appeals. The order filed today thus perpetuates a maverick version of the attorney-client privilege—a rule of national application. In addition, the attorney-client privilege, as a rule of evidence for the federal courts, has an overriding need for national uniformity. Considering that this circuit's position clashes with that of a majority of other circuits, our order that we rehear this matter en banc was most providently granted.

I

The crime-fraud exception defeats the attorney-client privilege. To invoke the exception, the government must make a prima facie showing that an otherwise privileged communication is in furtherance of fraud or crime. In this circuit the government has had to make the prima facie showing by the use of independent evidence—evidence other than the suspect communication itself. Elsewhere the government has been able to make the prima facie showing by the court's in camera inspection of the suspect communication. The substantive issue in this en banc case is: should we overrule *Shewfelt,* eliminate the independent evidence requirement, and allow in camera inspection of suspect communications? We should.

II

Every circuit to face the situation this case presents has allowed in camera inspection. In reverse chronological order, they are the Sixth, Second, D.C., Eighth, Third, and Fourth Circuits.[2] Following is a sample of the cases.

Sixth: *In Re Antitrust Grand Jury,* 805 F.2d 155, 168-169 (6th Cir. 1986).

Second: *In Re Grand Jury Subpoena Duces Tecum,* 798 F.2d 32 (2d Cir. 1986); *In Re John Doe Corp.,* 675 F.2d 482, 486 and 490 (2d Cir. 1982).

D.C.: *In Re Sealed Case,* 754 F.2d 395, 399-401 (D.C. Cir. 1985) (IRS case closely resembling case now before us); *In Re Sealed Case,* 676 F.2d 793, 815 (D.C. Cir. 1982).

Eighth: *Pritchard-Keang Nam Corp. v. Jaworski,* 751 F.2d 277, 280 (8th Cir. 1984); *In Re Berkley & Co.,* 629 F.2d 548, 553 (8th Cir. 1980); *In Re Murphy,* 560 F.2d 326, 331 and 338 n.23 (8th Cir. 1977); *Pfizer Inc. v. Lord,* 456 F.2d 545, 551 (8th Cir. 1972) (per curiam).

Third: *In Re Grand Jury Proceedings (FMC Corp.),* 604 F.2d 798, 800 (3d. Cir. 1979).

Fourth: *Union Camp Corp. v. Lewis,* 385 F.2d 143, 144 (4th Cir. 1967).

III

Other circuits have not always addressed the underlying policy question in allowing in camera review for purposes of the crime-fraud exception. As an en banc panel

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[2] The Church of Scientology fails to distinguish these cases in any principled way. The Church does point out, correctly, that one of the D.C. cases only represents the views of one member of that court. *See In Re Sealed Case,* 676 F.2d 793, 815 (D.C. Cir. 1982)(J. Skelly Wright).

establishing the law of this circuit, however, we are obligated to address the policy question.

In particular, we are charged with evaluating the tradeoff between maintaining confidentiality and prosecuting crimes. In addressing this policy question, the Second Circuit considered an additional factor, grand jury secrecy. Grand jury secrecy would rest on the scale alongside maintaining confidentiality, weighing *against* in camera inspection; still the Second Circuit found that the balance tipped in favor of in camera inspection. *In Re John Doe Corp.,* 675 F.2d at 490.

The need to prosecute crimes strongly supports in camera inspection. The attorney-client privilege was not designed to protect communications in furtherance of fraud or crime. When a communication, otherwise within the privilege, itself furthers fraud or crime, independent evidence of that fact rarely will be available. In such cases the independent evidence requirement would simply insulate dishonest parties from prosecution. *See United States v. King,* 536 F.Supp 253, 262 (C.D. Cal. 1982) (declining to follow *Shewfelt's* independent evidence requirement).

Church of Scientology suggests that in camera inspection would undermine several important policies. First, inspection would allow the crime-fraud exception to eviscerate the attorney-client privilege. According to the Church, the possibility of inspection could "chill open attorney-client discussions." The fact that the inspections take place in camera, however, mitigates any chilling effect. A judge is not a prosecutor and will not expose discussions that are unrelated to the fraud or crime alleged.

Second, according to the Church, inspection would force courts to review "any and all attorney-client com-

munications upon the mere allegation by a party . . . that the crime-fraud exception applies." The fear of disclosure of even innocent communications would give prosecutors an unfair litigation advantage, and courts would incur the intolerable burden of reviewing file after file of communications.

In fact, the fear of disclosure of innocent communications would be reduced if the Ninth Circuit eliminated the independent evidence rule. In camera inspection would allow a district court more precisely to determine which communications further crime or fraud and which do not. *Compare In Re Antitrust Grand Jury*, 805 F.2d 155, 168 (6th Cir. 1986).

In any case, the predicate for the Church's conclusions is incorrect: in camera inspection need not force courts to review any and all documents alleged to fall within the crime-fraud exception. I would set out a rule that gives district courts discretion. Besides helping to prevent prosecutorial fishing expeditions, a rule affording discretion to district courts would allow those courts to regulate their burden of in camera review.

A district court, faced with an argument that the crime-fraud exception applies, would decide for itself whether a given case warrants in camera review. A district court would exercise its discretion to conduct in camera review according to the circumstances—including the presence or absence of circumstantial and other independent evidence. In a proper case, a district court might *reject* the crime-fraud exception without in camera review: without inspecting all documents alleged to evidence crime or fraud, or even without inspecting any documents—without hearing all conversations alleged to evidence crime or fraud, or even without hearing any conversations.

For additional protection of privileged documents—to avoid disclosure of innocent documents—I would also set out a rule that requires district courts to *allow* the crime-fraud exception only in relation to communications that the court individually has inspected in camera. This approach would be in line with the Sixth Circuit's position. In *In Re Antitrust Grand Jury*, 805 F.2d 155, 168 (6th Cir. 1986), the Sixth Circuit required the district court to review documents in camera before ordering them produced:

> Not only do we believe *in camera* review is mandated to determine the scope of the order, *in camera* review of the documents could have assisted the court in determining whether a *prima facie* violation had been made.

Church of Scientology hints that inspection would undermine another policy, that of supporting adversarial argument. In endorsing in camera review, the Second Circuit decided that limitations on adversarial argument are outweighed by the need to resolve an evidentiary question while preserving confidentiality. 675 F.2d at 490. In any case, the independent evidence rule itself does not support adversarial argument insofar as the subject of the argument—the communication alleged to be in furtherance of crime or fraud—is available to one party and not the other. At best a distorted form of adversarial argument can occur.

Finally, according to the Church, Federal Rule of Evidence 104(a) and *Bourjaily v. United States*, 107 S.Ct. 2775 (1987), indicate that a court making preliminary inquiries about a privilege must abide by preexisting evidence rules such as the indpendent evidence requirement. Rule 104(a), however, is not on point. The rule deals with questions about the existence of a privilege; not about an exception to a privilege:

> Preliminary questions concerning the qualification of a person to be a witness, the existence of a privilege, or the admissibility of evidence shall be determined by the court, subject to the provisions of subdivision (b). In making its determination it is not bound by the rules of evidence except those with respect to privileges.

Church of Scientology gains no support for the independent evidence requirement by analogy to Rule 104(a). In the Ninth Circuit the rules of evidence with respect to privileges do allow for in camera review: a court undertakes in camera review of documents to decide whether the attorney-client privilege even exists with respect to those documents. *In Re Grand Jury Witness,* 695 F.2d 359, 362 (9th Cir. 1982).

Church of Scientology garners no support from *Bourjaily*. In that case the Supreme Court held that a showing to admit a co-conspirator's statement under Rule 801(d)(2) need not rely on independent evidence, but may rely on the statement itself. If anything *Bourjaily* suggests that a court may indeed examine suspect communications when considering the crime-fraud exception. *Compare* 107 S.Ct. at 2780.

Accordingly, I would overrule *Shewfelt,* eliminate the independent evidence requirement, and allow in camera inspection of suspect communications. The way I would formulate the rule, however, would dictate that we affirm the district court in this case.

IV

The government argues that the district court abused its discretion by rejecting the crime-fraud exception without inspecting all the tape recorded communications known to the government. According to the rule I have described, a

district court would be within its discretion to *reject* the exception without inspecting all suspect communications or even any communications. In this case the government submitted only a partial transcript of material to the district court. When the government submitted that partial transcript, the government was aware of the entire contents of the tapes. *See* Government's Brief at 12 (discussing Xanthos Declaration submitted to district court on motion for reconsideration). The district court was entitled to rely on the government to highlight, to the best of its ability, those parts of the tapes that might fall within the crime-fraud exception.

On appeal the government asks us to order the district court to inspect those parts of the tapes that were not within the partial transcript. In the district court, however, the government did not indicate that a partial transcript was an inadequate basis for a ruling on the crime-fraud exception. *See* Denial of Motion for Reconsideration, Government's Supplemental Excerpt of Record at Tab 80. The government never explained why it had failed to include the other parts of the tapes in the partial transcript in the first place. *Id.* The district court was well within its discretion to consider only the partial transcript, and the district court did not abuse its discretion in rejecting the crime-fraud exception.

V

We should overrule *Shewfelt* and eliminate the independent evidence requirement. An appropriate rule would make in camera review discretionary for the district court to reject the crime-fraud exception, mandatory for the district court to allow the exception and order disclosure. In this case the district court did not abuse its discretion by rejecting the exception without a complete review.

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

Nos. 85-6065, 85-6105

UNITED STATES OF AMERICA,
PETITIONER/APPELLEE/CROSS-APPELLANT

v.

FRANK S. ZOLIN, RESPONDENT/APPELLEE

AND

CHURCH OF SCIENTOLOGY OF CALIFORNIA AND MARY SUE HUBBARD, INTERVENORS/APPELLANTS/CROSS-APPELLEES

Nov. 6, 1987

Prior Report: 809 F.2d 1411.

Before: BROWNING, Chief Judge, GOODWIN, WALLACE, KENNEDY, ANDERSON, HUG, TANG, SCHRODER, FLETCHER, FARRIS, PREGERSON, ALARCON, POOLE, NELSON, CANBY, NORRIS, REINHARDT, BEEZER, HALL, WIGGINS, BRUNETTI, KOZINSKI, NOONAN, THOMPSON O'SCANNLAIN, AND LEAVY, Circuit Judges.

ORDER

Upon the vote of a majority of the nonrecused regular active judges of this court, it is ordered that this case be reheard by the en banc court pursuant to Circuit Rule 35-3. The previous three-judge panel assignment is withdrawn.

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

Nos. 85-6065; 85-6105
D.C. No. CV85-440-HLH

UNITED STATES OF AMERICA,
PETITIONER/APPELLEE/CROSS-APPELLANT

v.

FRANK S. ZOLIN, RESPONDENT/APPELLEE

AND

CHURCH OF SCIENTOLOGY OF CALIFORNIA AND MARY SUE HUBBARD, INTERVENORS/APPELLANTS/CROSS-APPELLEES

OPINION

Argued and Submitted
November 6, 1986—Pasadena, California

Filed February 9, 1987

Before: JAMES R. BROWNING, Chief Judge, ALFRED T. GOODWIN AND JEROME FARRIS, Circuit Judges.

Opinion by Judge FARRIS

Appeal from the United States District Court
for the Central District of California
Harry L. Hupp, District Judge, Presiding

OPINION

FARRIS, Circuit Judge:

In July 1984, the Criminal Investigation Division of the IRS (Los Angeles District) began investigating L. Ron Hubbard's tax returns for the tax years 1979 through 1983. In October, the IRS served an administrative summons on the Clerk of the Los Angeles County Superior Court and requested that he produce certain documents relating to Hubbard's potential tax liability. (The Superior Court had obtained the documents in connection with an unrelated proceeding brought by the Church against a former member of the Church.) The Clerk willingly produced a number of documents, but refused to produce thirteen documents which had been ordered sealed by the Superior Court.

In January 1985, the Government initiated this action in an effort to compel the Clerk to produce the thirteen sealed documents. Shortly thereafter, the district court granted the motions to intervene which were brought by the Church and Mary Sue Hubbard. The Intervenors contended that each of the thirteen documents was either privileged, irrelevant, or both. They also argued that the summons was unenforceable because it was not issued pursuant to a "good faith" tax investigation.

Hearings were held in March and April. On April 30, 1985, the district court ruled that eight of the documents—exhibits 4-D, 4-E, 4-F, 4-G, 5-C, 5-G, 5-I, and 6-B—were irrelevant, privileged, or both, and did not need to be produced. It ruled that five documents—exhibits 5-K, 5-L, 5-O, 5-P, and 6-O—should be produced, but prohibited the IRS from disclosing them to another governmental agency except in connection with a criminal tax prosecution or with the court's approval. The court

further ruled that the Intervenors had failed to prove that the summons was not issued in "good faith."

The Intervenors filed timely notice of appeal on July 1, 1985. The Government filed timely notice of cross-appeal on July 15, 1985. The order appealed from is a final order which disposes of all claims of all parties. We have jurisdiction under 28 U.S.C. § 1291.

II. DISCUSSION

A. *Mootness*

On January 24, 1986, during the pendency of this appeal, L. Ron Hubbard died. The Intervenors argue that because Hubbard's death has foreclosed the possibility of any further investigation of Hubbard's potential criminal tax liability, this proceeding has become moot. We reject the argument for the reason stated in *United States v. Author Services*, 804 F.2d 1520, 1522 n.1 (9th Cir. 1986).

B. *Relevance of Exhibits 5-O, 5-P, and 6-O*

The IRS' power to examine records in connection with tax investigations is broadly construed. *See Liberty Financial Services v. United States*, 778 F.2d 1390, 1392 (9th Cir. 1985); *De Masters v. Arend*, 313 F.2d 79, 87 (9th Cir. 1963). The relevance of such evidence depends on whether it might throw light on the correctness of a taxpayer's returns. *United States v. Goldman*, 637 F.2d 664, 667 (9th Cir. 1980). The Government must demonstrate a "realistic expectation" of relevance, rather than an "idle hope" of relevance. *Id.* (quoting *United States v. Harrington*, 388 F.2d 520, 524 (2d Cir. 1969).

The Government bases its claims that the three exhibits are relevant on the declaration of Agent Petersell, in which Petersell stated:

I have read the Petition to Enforce Internal Revenue Service Summons. Each of the items listed . . . is relevant to the investigation of L. Ron Hubbard in one or more of the following respects:

A. Determining the extent to which income from the Church of Scientology inured to the benefit of L. Ron Hubbard.

B. Determining whether L. Ron Hubbard conspired with others to impair and impede the Internal Revenue Service in the admiistration of the tax laws.

C. Determining whether any violations of the Internal Revenue laws were done willfully with intent to evade tax.

The Government's other evidence of relevancy consists of three terse descriptions of the documents' contents in the petition for enforcement of the summons:

00000(5-0)	LRH note regarding the Mayor of Clearwater, Florida, 22 March 1978.
PPPPP (5-P)	LRH Statement regarding money from Scientology, 16 Feb. 1978.
000000(6-0)	LRH handwritten note regarding the Fair Game policy.

The record does not indicate the Government's sources for this information.

While the Government might have made a better showing, the district court did not clearly err in concluding that Petersell's declaration, when coupled with the general descriptions of the documents in the petition to enforce the summons, was sufficient to establish the relevance of the documents. We do not ignore our statement in *Goldman:*

> The Government's burden, while not great, is also not non-existent. The Government appears to argue that the mere assertion of relevance by [an IRS agent] satisfied that burden. Even to the extent this might be true for records concerning the tax years being examined, relevance is not so clear when records for other years are sought.

Goldman, 637 F.2d at 667. Notwithstanding the fact that exhibits 5-O, 5-P, and 6-O all relate to years other than the tax years under investigation, we are satisfied that the district court, after balancing the indicia of relevancy against the impossibility of fully knowing the documents' contents before an actual review, did not clearly err in determining that the documents "might throw light" on the correctness of L. Ron Hubbard's return information.

C. Waiver of Privilege As to Exhibits 5-K and 5-L

The Intervenors do not contest on appeal the relevance of exhibits 5-K and 5-L. Instead, they contend that the district court erred in ruling that privileges which might otherwise have applied to the two documents were waived by a voluntary delivery of the documents to Gerald Armstrong. In addition, they argue that the district court erred when it concluded that exhibit 5-L would not be protected by the attorney-client privilege even in the absence of waiver because the affidavit of Hubbard's former attorney was too vague and conclusory to validly assert the privilege.

The attorney-client privilege is to be strictly construed *Weil v. Investment/Indicators, Research & Management, Inc.,* 647 F.2d 18, 24 (9th Cir. 1981). *See* 8 J. Wigmore, *Evidence* § 2291 at 554 (McNaughton rev. 1961). The logic behind the strict construction of the attorney-client privilege applies with equal force to the marital communications privilege: like the attorney-client privilege, the marital communications privilege is "an obstacle to the

investigation of the truth. . . . [that] ought to be strictly confined within the narrowest possible limits consistent with the logic of its principle." *Id.* The burden of demonstrating the existence of an evidentiary privilege rests on the party asserting the privilege. *See United States v. Gann,* 732 F.2d 714, 723 (9th Cir. 1984) (attorney-client privilege); *Weil,* 647 F.2d at 25 (evidentiary privileges generally). In order to establish the applicability of the attorney-client privilege to a given communciation, the party asserting the privilege must affirmatively demonstrate non-waiver. *See id.; United States v. Landof,* 591 F.2d 36, 38 (9th Cir. 1978).

The voluntary delivery of a privileged communication by a holder of the privilege to someone not a party to the privilege waives the privilege. *See Clady v. County of Los Angeles,* 770 F.2d 1421, 1433 (9th Cir. 1985) (the voluntary disclosure of a privileged attorney-client communication constitutes waiver); *United States v. McCown,* 711 F.2d 1441, 1452-53 (9th Cir. 1983) (the marital communications privilege is inapplicable to communications not intended to remain confidential); *Weil,* 647 F.2d at 24 (the voluntary disclosure of a privileged attorney-client communication constitutes waiver). Moreover, when the disclosure of a privileged communication reaches a certain point, the privilege may become extinguished even in the absence of a wholly voluntary delivery. *See In re Sealed Case,* 676 F.2d 793, 818 (D.C. Cir. 1982) ("Any disclosure inconsistent with maintaining the confidential nature of the attorney-client relationship waives the privilege."). Whether the circumstances of the delivery of exhibits 5-K and 5-L to Armstrong gave rise to a waiver of the otherwise applicable privileges is a mixed question of law and fact that we review *de novo. See United States v. McConney,* 728 F.2d 1195, 1199-1204 (9th Cir. 1984) (en banc).

The district court held that all privileges potentially applicable to exhibits 5-K and 5-L were waived by a voluntary delivery of the documents to Gerald Armstrong. We agree. The Intervenors argue that the delivery could not have been voluntary since the correspondence between Armstrong and Hubbard contains no express indication that Armstrong intended to, or had Hubbard's permission to, collect communications between Hubbard and his wife or between Hubbard and his attorneys.

Although Hubbard did not explicitly grant Armstrong access to attorney-client or marital communications, Hubbard did, in a memorandum to Armstrong, grant Armstrong general permission to collect documents relevant to the proposed biography of Hubbard. The Intervenors' only argument in support of non-waiver is that Hubbard did not specifically grant Armstrong access to attorney-client and marital communications. More is required.

Since the attorney-client privilege which might otherwise have attached to exhibit 5-L was waived, we need not consider whether the attorney-client privilege was validly asserted by Hubbard's former attorney.

D. *Limited Evidentiary Hearing*

We review for abuse of discretion. *See United States v. Stuckey,* 646 F.2d 1369, 1373 (9th Cir. 1981). *See generally Rae v. Union Bank,* 725 F.2d 478, 481 (9th Cir. 1984) (a district court's decisions relating to discovery matters are reviewed for abuse of discretion).

The purpose of the limited evidentiary hearing was to determine whether the summons enforcement proceeding was legitimate and in "good faith," rather than merely camouflage for an ulterior non-tax motive. The "good faith" standard seeks to prevent the IRS from becoming an information-gathering agency for other governmental

agencies. *See United States v. LaSalle National Bank*, 437 U.S. 298, 317 (1978); *Stuckey*, 646 F.2d at 1373. The task is to identify " 'those rare cases where bald allegations of harassment or improper purpose can be substantiated.' " *Author Services*, 804 F.2d at 1523 (quoting *United States v. Church of Scientology of California*, 520 F.2d 818, 824 (9th Cir. 1975)). The focal issue is whether an IRS investigation is motivated by legitimate tax purposes. *See United States v. Powell*, 379 U.S. 48, 57-58 (1964). The district court may properly limit evidentiary hearings on the "good faith" issue to prevent a frustration of legitimate Government objectives. *Church of Scientology*, 520 F.2d at 823-25.

The Intervenors argue that the district court improperly limited its inquiry to the issue of whether the summons itself was issued in "good faith," and ignored and larger issue of whether the overall investigation was in "good faith." We reject the argument. At the hearing, C. Phillip Xanthos, the Branch Chief of the IRS Criminal Investigation Division (Los Angeles District), specifically testified as to the legitimate tax-determination objectives of the investigation. This and other testimony was sufficient to support the district court's finding that the summons was issued in "good faith." *See LaSalle National Bank*, 437 U.S. at 317. *See also Stuckey*, 646 F.2d at 1376; *United States v. Zack*, 521 F.2d 1366, 1368-69 (9th Cir. 1975).

E. *Restrictions on IRS Disclosure of the Summoned Documents*

The district court ordered that "the documents produced in response to the summons shall not be delivered to any other government agency by the IRS unless criminal tax prosecution is sought or an Order of Court is obtained." We review the district court's order for abuse

of discretion. *See United States v. Columbia Broadcasting System*, 666 F.2d 364, 368 (9th Cir. 1982).

The Government argues that the district court's order conflicts with the disclosure provisions of 26 U.S.C. § 6103. Those provisions, the Government suggests, are the exclusive limitations upon IRS disclosure of return information. In addition, the Government argues that the order represents an improper attempt to enjoin the IRS from obeying a duly enacted federal law.

We recently rejected this argument in *Author Services*, and held that a district court's order restricting the IRS' ability to disclose summoned materials to other governmental agencies, "[r]ather than being an abuse of discretion, . . . [could] be a wise exercise of control." *Author Services*, 804 F.2d at 1526. The district court's order in this case created a mechanism whereby the district court could monitor the IRS' use of the summoned documents. This is an appropriate exercise of the district court's discretion: "It is the court's process which is invoked to enforce the administrative summons and a court may not permit its process to be abused." *Powell*, 379 U.S. at 58. *See S.E.C. v. ESM Government Securities, Inc.*, 645 F.2d 310, 316-17 (5th Cir. 1981). A district court may, when appropriate, condition enforcement of a summons on the IRS' agreeing to abide by disclosure restrictions. *Author Services*, 804 F.2d at 1525 (citing *United States v. Texas Heart Institute*, 755 F.2d 469, 481 (5th Cir. 1985)).

The Intervenors also argue that the district court's order violates 26 U.S.C. § 7421(a) (the "Anti-Injunction Act"), because it has the effect of enjoining the IRS from disclosing the summoned tax information. We reject the argument for the reasons stated in *Author Services*, 804 F.2d at 1526.

F. *Exhibit 5-C ("the Tapes")*

The district court's rulings on the scope of the attorney-client privilege involve mixed questions of law and fact, and are reviewable *de novo*. *See McConney*, 728 F.2d at 1202. Where the relevant scope of the attorney-client privilege is clear and the decision that the district court must make is essentially factual, however, the district court's rulings as to the privilege are reviewed for clear error. *Id.* at 1200.

The Government contends that the district court erred in finding that the "common interest" rule covered the tapes. The "common interest" rule protects communications made when a nonparty sharing the client's interests is present at a confidential communication between attorney and client. The paradigm case is where two or more persons subject to possible indictment arising from the same transaction make confidential statements that are exchanged among their attorneys. *See Hunydee v. United States*, 355 F.2d 183, 185 (9th Cir. 1965).

The Government is incorrect, however, in arguing that the "common interest" rule is limited to such a case. Even where the non-party who is privy to the attorney-client communications has never been sued on the matter of common interest and faces no immediate liability, it can still be found to have a common interest with the party seeking to protect the communications. *See Burlington Industries v. Exxon Corp.*, 65 F.R.D. 26, 44-45 (D. Md. 1974); *Stanley Works v. Haeger Potteries, Inc.*, 35 F.R.D. 551, 554-55 (N.D. Ill. 1964).

The district court found that the parties present at the meetings recorded on the tapes "had a common interest" in sorting out the respective affairs of the Church and Mr. Hubbard. We agree. All of the non-lawyers present at the meeting were employees of the Church.

The Government also challenges the district court's finding that the Church did not waive its attorney-client privilege when it inadvertently delivered the tapes to Armstrong. (Hubbard's personal secretary gave Armstrong the tapes under the mistaken impression that they were blank.) In *Transamerica Computer Co., Inc. v. International Business Machines, Corp.*, 573 F.2d 646 (9th Cir. 1978), we held that whereas a waiver of the attorney-client privilege occurs when a holder of the privilege voluntarily discloses the privileged matter, no waiver occurs if the holder has no opportunity to claim the privilege or if the holder was erroneously compelled to disclose the privileged matter. *Id.* at 651. The secretary's delivery of the tapes to Armstrong was sufficiently involuntary and inadvertent as to be inconsistent with a theory of waiver.

The Government challenges the district court's ruling that the "crime-fraud" exception to the attorney-client privilege did not apply to the tapes. The attorney-client privilege does not protect communications that further a crime or fraud. *See United States v. Hodge and Zweig*, 548 F.2d 1347, 1354 (9th Cir. 1977). The Government had the burden of making a prima facie showing that the attorney-client communications recorded on the tapes were in furtherance of an intended or present illegality. *Id.* We agree with the district court's conclusion that the Government failed to satisfy this burden.

The Intervenors argue that the Government's evidence of crime or fraud must come from sources independent of the attorney-client communications recorded on the tapes. In support of this argument, they cite *United States v. Shewfelt*, 455 F.2d 836 (9th Cir. 1972). In *Shewfelt*, we said that "before the privileged status of [attorney-client] communications can be lifted, the government must first establish a prima facie case of fraud *independently* of said communications." *Id.* at 840 (emphasis added). Notwith-

standing *Shewfelt*, the Government argues that in assessing the applicability of the "crime-fraud" exception to the tapes the district court should have considered evidence of the contents of the tapes which the Government presented to the court.

Shewfelt's independent evidence requirement has been strongly criticized. In *In re Berkley and Co., Inc.*, 629 F.2d 548, 553 n.9 (8th Cir. 1980), the Eighth Circuit observed that the two cases cited in *Shewfelt*, assertedly in support of the independent evidence requirement, in fact simply state that a party seeking disclosure under the "crime-fraud" exception must make a prima facie showing of crime or fraud in order to shift the burden of showing the inapplicability of the exception to the party resisting disclosure.

In the fourteen years that have passed since *Shewfelt* was decided, only one court has cited it as authority for the independent evidence requirement. *See Kockums Industries Limited v. Salem Equipment, Inc.*, 561 F. Supp. 168, 171 (D. Ore. 1983). By contrast, a number of courts have rejected the *Shewfelt* position. *See, e.g., In re Sealed Case*, 676 F.2d at 815; *In re Special September 1978 Grand Jury*, 640 F.2d 49, 59 (7th Cir. 1980); *In re Berkley*, 629 F.2d at 553 n.9; *Coleman v. American Broadcasting Companies, Inc.*, 106 F.R.D. 201, 207 n.9 (D.D.C. 1985); *United States v. King*, 536 F. Supp. 253, 262 (C.D. Cal. 1982).

In *Hodge and Zweig*, we discussed the "crime-fraud" exception at length without ever referring to *Shewfelt*. 548 F.2d at 1354-55. Instead, we cited repeatedly to *United States v. Friedman*, 445 F.2d 1076 (9th Cir. 1971), a decision which implicitly recognized that a district court may examine the disputed communications themselves in order to determine the applicability of the "crime-fraud" exception. *Id.* at 1354.

In this case, the communications recorded on the tapes appear to be the Government's best evidence establishing the applicability of the "crime-fraud" exception. This is not surprising, since the illegal advice allegedly given by Church attorneys to Church officials is an integral part of the intended illegality that the Government seeks to establish. In this connection, the court's observation in *King* is pertinent: "[S]ince the illegal advice is usually given in the attorney-client setting, applying *Shewfelt* to such cases would, in most instances, simply serve to insulate dishonest attorneys from prosecution for obstruction of justice." *King*, 536 F. Supp. at 262.

In *King*, the court speculated that "the independence test set forth in *Shewfelt* does not appear to be the law in the Ninth Circuit." *Id.* We cannot agree. Whatever the merits of the criticisms that have been leveled against *Shewfelt*'s independent evidence requirement, we are bound to adhere to our holding in *Shewfelt* unless and until it is reversed by an *en banc* panel of this court. *See United States v. Spilotro*, 800 F.2d 959, 967 (9th Cir. 1986); *Atonio v. Wards Cove Packing Co., Inc.*, 768 F.2d 1120, 1132 n.6 (9th Cir. 1985).

The Government's independent evidence of intended illegality consists primarily of: 1) Agent Petersell's Supplemental Declaration of March 8, 1985, in which Petersell stated that his discussions with Gerald Armstrong had given him reason to believe that the communications recorded on the tapes focused generally on the intentional violation of the tax laws; and 2) Petersell's Supplemental Declaration of March 15, 1985, in which Petersell stated that his discussions with three other former Church employees had given him reason to believe that the communications recorded on the tapes specifically focused on i) a proposed scheme whereby the Church's cash transfers to Hubbard would be disguised as payments for services

rendered (allegedly to insulate Hubbard from tax liability and to protect the Church's tax-exempt status), and ii) a proposed scheme whereby Hubbard would be able to control royalty income derived from the "Trademark Trust" (a trust that was created to manage Hubbard's various Scientology-related and other trademarks) without that control being traceable to him.

We agree with the district court that this evidence, while not altogether insubstantial, is not sufficient to make out the requisite prima facie showing of intended illegality.

AFFIRMED.

APPENDIX D

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CV 85-0440-HLH

UNITED STATES OF AMERICA

v.

FRANK ZOLIN

CIVIL MINUTES – GENERAL

Date June 10, 1985

PRESENT: Hon: HARRY L. HUPP, Judge

ATTORNEYS PRESENT FOR PLAINTIFFS:
Robert S. Horwitz, AUSA C. Magnusen

ATTORNEYS PRESENT FOR DEFENDANTS:
Gordon, Trask, Donald Randolph,
Michael Lee Hertzberg (for intervenors)

PROCEEDINGS: Plaintiff's Motion for Reconsideration

The motion for reconsideration of the court's order of April 30, 1985, is denied.

Plaintff complains that the court should have listened to the tapes in :oto. While this was at one time discussed with counsel, thereafter Mr. Petersell's declaration was sub-

mitted, and no one suggested that this was an inadequate basis on which to determine the attorney-client privilege question. Mr. Xanthos' declaration stands on a similiar footing; no reason is suggested as to why it could not have been submitted as a part of the materials considered in the April hearings.

Plaintiff also complains that the court should not have restricted the IRS from disclosing for other governmental purposes the contents of the documents ordered produced. Since the entire basis of the summons proceeding was to obtain material for a tax investigation, the court thinks it reasonable to restrict the use of the material for that purpose, unless a criminal prosecution is instituted. If exigencies of other litigation make it necessary, the IRS is free to make its case for an exception to this court.

APPENDIX E

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

No. CV 85-0440-HLH

UNITED STATES OF AMERICA, PETITIONER

vs.

FRANK S. ZOLIN, CLERK OF THE SUPERIOR COURT, RESPONDENT

CHURCH OF SCIENTOLOGY OF CALIFORNIA, INTERVENOR

[Filed Apr. 30, 1985]

ORDER

The Court makes the following Orders and Findings:

1. Reconsideration is denied as to Exhibits 5G and 5I; the Order of March 12, 1985 will stand.

2. Intervenor Church has failed to raise any doubt of the good faith of the Internal Revenue Service in pursuing this summons enforcement proceeding. Specifically, it is found that a bona fide criminal tax investigation of L. Ron Hubbard is being conducted by the IRS for the years 1979-83, that the matter has not been referred to the Department of Justice for prosecution, that the summons was validly issued pursuant to that investigation, that the agent issuing the summons was in good faith in doing so, and did not do so for an improper purpose, or to harass the taxpayer, or for a collateral purpose. No further discovery on this issue is warranted.

3. With the exception of Exhibits 6B and 5C (the "MCCS tapes"), the Court finds that all potentially applicable privileges (attorney-client, marital) have been waived by voluntary delivery of the material to Gerald Armstrong. In addition, no privilege has been validly asserted by the holder of a potential privilege as to certain items (Exhibits 5L and 5P).

4. Sufficient relevancy being shown, the IRS is entitled to inspect and copy Exhibits 5K, 5L, 5O, 5P and 60, and the summons is to be enforced as to those items.

5. No relevancy or waiver has been shown for Exhibit 6B, and it need not be produced.

6. As to Exhibit 5C (the "MCCS tapes"), the Court finds:

(a) The tapes consist of confidential communications between attorneys and clients or clients' authorized agents.

(b) The confidential communications were between clients and their attorneys who had a common interest; the privilege was, therefore, not destroyed by publication of the communication to an outsider.

(c) There was no waiver of the privilege by delivery to an outsider, the Court finding that the tapes were delivered to Gerald Armstrong by mistake, and, in addition, that Petitioner has not carried the burden of showing waiver.

(d) The "fraud-crime" exception to the attorney-client privilege does not apply. The quoted excerpts tend to show or admit past fraud but there is no clear indication that future fraud or crime is being planned.

(e) The Order sealing the Petersell affidavit (filed March 15, 1985) quoting excerpts from the tapes will remain sealed.

(f) This Court's copy of the tapes will remain sealed in possession of the Court's Clerk until after any appellate

review of this Order, after which it is to be returned to the Superior Court. The Clerk of the Superior Court need not produce its copy of the tapes pursuant to the summons.

7. The documents delivered hereunder shall not be delivered to any other government agency by the IRS unless criminal tax prosecution is sought or an Order of Court is obtained.

Petitioner is to prepare an Order in accord with this Order and the Order of March 12, 1985. This Order is stayed for sixty (60) days, and thereafter if an appeal or application for a writ is filed and until decision on appeal or writ application is rendered.

IT IS SO ORDERED.

DATED: April 30, 1985.

/s/ HARRY L. HUPP

HARRY L. HUPP
United States District Judge

APPENDIX F

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

No. CV 85-0440-HLH

UNITED STATES OF AMERICA, PETITIONER

vs.

RAUL ACOSTA, ACTING COUNTY CLERK,
LOS ANGELES COUNTY, RESPONDENT

CHURCH OF SCIENTOLOGY OF CALIFORNIA, INTERVENOR

Filed Mar. 12, 1985

INTERIM ORDER RE PETITION TO ENFORCE SUMMONS

1. Intervenor's request to stay these proceedings is denied.

2. The petition to enforce summons is denied as to the following documents on the ground that sufficient relevancy to the IRS inquiry has not been shown:

4-D, 4-E, 4-F, 4-G, 5-G and 5-I

(5-I is not mentioned by petitioner; thus, no relevancy shown; the remaining documents go back to the '40s, '50s and '60s, and are hardly relevant to tax years 1979-83.)

3. Intervenor's discovery request is denied.

4. Intervenor's request for an evidentiary hearing on the "good faith" issue is granted as required by *U.S.A. v. Church of Scientology* (9th Cir. 1975) 520 F.2d 818. The

hearing is limited to one hour, during which the Church may examine Mr. Petersell.

5. The balance of the hearing is continued to April 1, 1985, at 10:00 a.m., for the purpose of substituting Mr. Zolin, in his capacity as Superior Court Clerk, in place of Mr. Acosta as Acting Clerk, and to specifically invite the Superior Court, the California Court of Appeal, Second District, Division 3, and the California Supreme Court to intervene on or before March 25, 1985 to express their position, if they desire and have a position on this summons.

(The County Counsel is right in saying that the Clerk is a ministerial officer of the Superior Court and that the documents are in the possession of the Superior Court, not its ministerial employees. This Court has the duty to enforce federal law and sees nothing on the surface of this case that would indicate that doing so conflicts with the purposes or interests of the Superior Court; nevertheless, that court, being in possession of the documents in question, must be allowed to express any concerns it has before the Court proceeds. In addition, the state Court of Appeal has restrained, pending appeal, release of certain documents, and should be asked to present any concerns to this Court arising out of this proceeding. This Court assumes that the real parties in interest here are Armstrong and Mrs. Hubbard (who have not intervened) and Intervenor Church, that one or the other will eventually be entitled to the documents on the state court judgment becoming final, and that this Court should examine the pending petition from the perspective of the rights of those parties, not the state court. However, this conclusion will not be drawn finally until the state courts in interim con-

trol of the documents have a chance to express their positions, if any.)

IT IS SO ORDERED.

DATED: March 12, 1985.

/s/ HARRY L. HUPP

HARRY L. HUPP
United States District Judge

U.S. GOVERNMENT PRINTING OFFICE 1986 – 202 037 60520

No. 88-40 (2)

Court, U.S.
FILED
SEP 26 1988
F. SPANIOL, JR.
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

UNITED STATES OF AMERICA,

Petitioner,

v.

FRANK S. ZOLIN, CHURCH OF SCIENTOLOGY OF CALIFORNIA and MARY SUE HUBBARD,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

RESPONDENTS' SUGGESTION OF MOOTNESS AND BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

ERIC M. LIEBERMAN
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Dated: September 26, 1988

37pp

Parties to the Proceedings Below and Rule 28.1 List

The parties to the proceedings below are set forth in the caption.

Respondent Church of Scientology of California has no parent companies, subsidiaries or affiliates to list pursuant to Rule 28.1.

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No. 88-40

IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

UNITED STATES OF AMERICA,

Petitioner,

v.

FRANK S. ZOLIN, CHURCH OF SCIENTOLOGY OF CALIFORNIA and MARY SUE HUBBARD,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

RESPONDENTS' SUGGESTION OF MOOTNESS AND BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Respondents Church of Scientology of California and Mary Sue Hubbard respectfully request that this Court deny the petition for writ of certiorari seeking review of the judgment of the Ninth Circuit in this case. Respondents further suggest that this case is now moot.

Statement of the Case

This case arises from the efforts of the Internal Revenue Service to obtain thirteen documents or tapes which were held under seal by the Clerk of the California Superior Court following a civil trial. The courts below denied the government access to eight items, including tape recordings (the "MCCS tapes") of meetings between

Church representatives and legal counsel, on the ground that the meetings are protected from disclosure by the attorney-client privilege. The courts below enforced the summons with respect to five documents, but ordered that these five documents "shall not be delivered to any other government agency by the IRS unless criminal tax prosecution is sought or an Order of Court is obtained." (Pet. App. 29a.)

1. In July 1984, the Criminal Investigation Division of the Los Angeles District Director's Office of the IRS commenced a tax investigation of L. Ron Hubbard. On October 24, 1984, the IRS served an administrative summons upon the County Clerk for Los Angeles County, who also serves as Clerk for the California Superior Court for Los Angeles, seeking production of numerous exhibits which were contained in the record of a pending Superior Court action entitled *Church of Scientology of California* v. *Armstrong* (No. C420153) and which remained under seal in the custody of the Clerk. The summons was captioned as relating to the investigation of Mr. Hubbard for the years 1979 through 1983. The Clerk agreed to produce some of the documents, but refused to allow the IRS to inspect and copy thirteen documents which had been sealed on various grounds, including attorney-client privilege, marital privilege and privacy, by the Superior Court.

On January 18, 1985, the government commenced this proceeding by filing a petition to enforce the summons, naming the County Clerk for Los Angeles County as the sole defendant. Thereafter, the Church and Mrs. Hubbard intervened in the district court to oppose enforcement of the summons. To the extent relevant here, the respondents opposed enforcement on two grounds: (1) with respect to the MCCS tapes, that they are protected by the attorney-client privilege; and (2) generally, that the summons had been issued for collateral purposes, *i.e.*, gathering information for use by other government agencies.

2. With respect to the MCCS tapes, the Church submitted affidavits demonstrating that the prerequisites for the assertion of the attorney-client privilege were present, *i.e.*, the tapes recorded communications between client and attorneys acting in their professional capacity, the communications were related to legal matters, and the communications were confidential. The government, while disputing the presence of various elements of the privilege, relied in large part on its assertion that the crime-fraud exception to the privilege stripped the tapes of their protection from disclosure. In support of its assertion, the government initially submitted a declaration of Special Agent Petersell based upon conversations he had had with a former Church staff member, and excerpts from the tapes set forth in the declaration of Gerald Armstrong, a former Church employee. The government requested the district court to review the tapes themselves to determine whether the crime-fraud exception was made out.

The Church responded that the court could not review the actual communications—whether in the form of transcripts, excerpts or the tapes themselves—to determine the application of the crime-fraud exception to the privilege, but rather must rely initially upon evidence independent of the communications in issue. The district court reserved judgment on this issue as well as whether the government had provided sufficient facts for the court to look further.

Four days later, and before any ruling from the district court on the propriety of its review of the contents of the communications in issue, the government filed yet another declaration of Agent Petersell, which had attached to it seventeen single spaced pages of a transcript of the tapes.[1]

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[1] The source of the transcript has never been revealed. The the government has stated that the source is not relevant to the issues of waiver which had been raised in the courts below. The

(footnote continued on following page)

Thereafter, on April 30, 1985, the district court ruled that it would consider the portions of the communications themselves to determine whether the crime-fraud exception applied to the tapes. During the hearing, the district court stated that it had reviewed all of the government's submissions, including the Petersell declaration with the seventeen pages of single spaced transcript of the tapes, and that it was inclined to rule that the exception to the privilege had not been made out. The district court specifically asked government counsel to "point out where I went wrong" (April 30, 1985 Transcript of Proceedings at 73) whereupon government counsel identified particular portions of the declarations and record. The colloquy ended with the district court asking if there was "anything else you [government counsel] want to point to" and government counsel replying negatively. At no point during this argument did the government request or suggest that the court should or was required to review the entire tapes themselves. Thereupon, the district court ruled that the crime-fraud exception did not apply.

The government moved for reconsideration, asserting that the district court should have reviewed the entire two hours of tapes. In doing so, the government sought to rely upon a declaration of Agent Phillip Xanthos which it filed under seal for *ex parte in camera* inspection by the district court without furnishing a copy to any other party.[2] The district court denied the motion for reconsideration on two grounds. First, it ruled that although a review of the tapes themselves had been discussed at one point,

(footnote continued from previous page)

transcripts were placed under seal by the district court on motion of the Church, and remained under seal in the Ninth Circuit, which also forbade counsel from quoting from them in the course of oral argument.

[2] The government never identified any basis for filing the declaration on an *ex parte* basis. The Church first received a copy of it during the proceedings in the Ninth Circuit. The declaration remains under seal.

"thereafter Mr. Petersell's declaration [with the seventeen-page single-spaced transcript] was submitted, and no one suggested that this was an inadequate basis on which to determine the attorney-client privilege question". (Pet. App. 26a.) Indeed, during argument on the motion for reconsideration, the district court explained its view that the government had waived its belated attempt to require the district court to listen to the complete two hours of tape when it had abandoned the argument after some discussion, submitted the seventeen page transcript and argued the case on the basis of those materials.[3] Second, the court ruled that "no reason is suggested as to why it [Mr. Xanthos' declaration] could not have been submitted as a part of the materials considered in the April hearings." (Pet. App. 26a.) According to local rule 7.16, a motion for reconsideration must rely upon facts or evidence which were not available at the time of initial consideration.

3. The district court did hold that five of the thirteen documents sought by the government were relevant to the tax years under investigation and that any privileges which could be raised had been waived. Prior to enforcing the summons as to the five documents, however, the district court held an evidentiary hearing on the good faith of the government. The hearing showed that the IRS agents responsible for issuing the administrative summons had communicated and partially coordinated their investigation with Justice Department attorneys representing other IRS agents who were defendants in a civil action brought by the Church alleging government misconduct.

Although the district court found that the record did not rise to the level necessary to deny enforcement of the

[3] When the district court asked "what's there to do now by hindsight" the government quite honestly responded "Nothing, Your Honor". Government counsel then tried to assert that they had not waived the argument, to which the district court observed they "[c]ertainly" had. (June 10, 1985 Transcript of Proceedings at 5.)

summons, it considered the case *sui generis* because of the many non-tax related civil litigations between the government and the Church and because of concern that "information acquired for one purpose may be in effect used for civil discovery in the other." (June 10, 1985 R.T. at 9.) Accordingly, the district court ordered that the five documents "shall not be delivered to any other government agency by the IRS unless criminal tax prosecution is sought or an Order of Court is obtained." (Pet. App. 29a.) The district court emphasized that as long as the intended disclosure was authorized by 26 U.S.C. § 6103, it would allow the disclosure.

4. A panel of the United States Court of Appeals for the Ninth Circuit affirmed the district court's judgment. (Pet. App. 11a-24a.) The panel held that the district court order requiring that the five documents not be delivered to any other government agency by the IRS unless criminal tax prosecution is sought or a court order is obtained was an appropriate and wise exercise of the district court's discretion. The panel reasoned that since the government had invoked the court's process to enforce the summons, the court had the power and authority to prevent its process from being abused. The panel rejected the government's argument that the order ran afoul of the Anti-Injunction Act, 26 U.S.C. § 7421(a), relying on the decision in *United States* v. *Author Services, Inc.*, 804 F.2d 1520, 1526 (9th Cir. 1986), where the court reasoned that "restricting disclosure of summoned information to other agencies only to the extent that a court order is necessary, does not restrain the assessment or collection of tax liability."

The panel affirmed the rulings of the district court with respect to the MCCS tapes. The panel applied the holding of *United States* v. *Shewfelt*, 455 F.2d 836, 840 (9th Cir.), *cert. denied*, 406 U.S. 944 (1972), that before the privileged status of the communications is lifted on the basis

of the crime-fraud exception, the government must first make a *prima facie* showing independently of the communications that the communications were in furtherance of an intended or present illegality. The panel then reviewed the government's evidence and held that it was not sufficient to make the requisite *prima facie* showing.

Thereafter, the government petitioned for rehearing and suggested rehearing *en banc* on both the order limiting disclosure to other agencies and the independent evidence rule, asserting an intra-circuit conflict on the latter question between *United States* v. *Friedman*, 445 F.2d 1076 (9th Cir.), *cert. denied*, 404 U.S. 958 (1971), and *United States* v. *Shewfelt*, 455 F.2d 836 (9th Cir. 1972). On November 6, 1987, the petition for rehearing *en banc* was granted. (Pet. App. 10a.)

On March 28, 1988, the *en banc* Court filed an order vacating the November 6, 1987 order granting *en banc* review as improvidently granted. (Pet. App. 1a-2a.) The *en banc* court explained that review had been granted on the mistaken assumption that there was a conflict between the panel decisions in *Shewfelt* and *Friedman*. The *en banc* court ordered that a portion of the panel opinion be withdrawn and, in all other respects, the panel opinion remained intact.

Three members of the *en banc* court dissented from the order vacating the November 6, 1987 order, but stated that they nevertheless would affirm the district court. (Pet. App. 2a-9a.) The dissenters wrote that the proper rule would "make *in camera* review discretionary for the district court to reject the crime-fraud exception, mandatory for the district court to allow the exception and order disclosure." (Pet. App. 9a.) The dissenters explained that under such a rule, the district court decision must be affirmed. This was so because when the district court initially ruled on the application of the exception, the government had submitted the transcripts submitted with the

Petersell declaration and it did not argue that the partial transcripts were an inadequate basis on which to decide the issue. Thus, when the government asked for reconsideration and attempted to submit the declaration of Mr. Xanthos purportedly discussing other portions of the tapes, the government never explained why it had failed to include this material in its prior submissions. In the dissenters' view, the issue was reduced to whether the district court acted within its discretion in considering only the transcripts initially submitted by the government and in not considering the material submitted for the first time on reconsideration. The dissenters would have held that there was no abuse of discretion. (Pet. App. 9a.)

In a separate concurrence (App. *infra*, 1a-2a) one member of the *en banc* court expressed the view that it was procedurally unclear whether the *en banc* order was a disposition on the merits and opined that if so, it is internally inconsistent because the *en banc* court cannot both decide a case on the merits and vacate its order granting *en banc* review. Nonetheless, the concurrence agreed that the independent evidence rule should be the law.

Suggestion of Mootness

The Internal Revenue Service Criminal Investigation Division summons which was the subject of the litigation below was dated October 24, 1984. The summons is captioned "In the Matter of Lafayette R. Hubbard" and concerns the tax years 1979-1983. Mr. Hubbard died on January 24, 1986, thus foreclosing any further criminal investigation of him. Subsequent to the filing of the government's petition herein, we have been informed by tax counsel for Mr. Hubbard's estate that the IRS civil audit of Mr. Hubbard's returns for the years 1979-1983 was terminated as a "closed case" as that term is defined in Rev. Proc. 85-13, Sec. 3.01(1); 1985-1 C.B. 514. We were

further informed that the requisite IRS Forms 870 for those years have been signed. As set forth in 26 CFR 601.105 (4), the signing of such forms "[a]s a matter of practice . . . ordinarily result[s] in the closing of a case insofar as the Government is concerned." Therefore, there would appear to be no remaining IRS proceedings, either criminal *or civil*, which could justify enforcement of the underlying summons, and all legal issues raised with respect to the summons are moot.

In the related case of *United States* v. *Author Services, Inc.*, 804 F.2d 1520 (9th Cir. 1986), *amended*, 811 F.2d 1264 (9th Cir. 1987) the court of appeals considered whether Mr. Hubbard's death rendered moot the enforcement of a similar IRS Criminal Investigation Division summons issued to another entity for other records regarding the identical investigation of Mr. Hubbard. The court of appeals concluded that the matter was not moot at that time because the records sought by the summons might still be relevant to a *civil* review of Mr. Hubbard's returns for the years at issue:

> During the pendency of this appeal, L. Ron Hubbard died, and ASI argues that the cause is now moot because the IRS summons was issued in furtherance of an exclusively criminal investigation. We are persuaded that the investigation of Mr. Hubbard, although primarily criminal in nature, entails essential civil elements as well, which survive his death. The summons seeks documents relating to the financial affairs of L. Ron Hubbard as they pertain to his tax liability or to any offenses connected with internal revenue laws. Therefore, this appeal is not moot.

804 F.2d at 1522 n.1.

In the instant case, the original panel of the court of appeals rejected a mootness suggestion "for the reason stated" in the *Author Services* case. 804 F.2d at 1414.

Now, however, no civil component to the summons can even arguably remain as the IRS has concluded its audit of Mr. Hubbard's returns for the years 1979-1983. Thus any further resolution of the legal issues posed by the government's petition would be purely hypothetical and abstract as there is no remaining case or controversy. *De Funis* v. *Odegaard*, 416 U.S. 312, 317 (1974).

REASONS WHY THE PETITION SHOULD BE DENIED

1. The Order Restricting Dissemination Of The Contents Of The Documents Ordered Produced To The IRS Was Consistent With Decisions Of This Court Recognizing The District Court's Discretion And Power To Protect Against Potential Abuses Of Its Process In Enforcing IRS Administrative Summonses, And Is Not In Conflict With The Holding Of The Fifth Circuit In Barrett.

a. In *United States* v. *Powell*, 379 U.S. 48 (1964), this Court unambiguously affirmed in the context of an IRS summons enforcement proceeding that the district court's role in an IRS summons enforcement proceeding is more than perfunctory. "It is the court's process which is invoked to enforce the administrative summons and *a court may not permit its process to be abused.*" 379 U.S. at 58. (emphasis added.) Although over the years the courts have been careful to leave the substantial burden of showing such an abuse on the taxpayer, and the procedures employed by the courts have assured that only assertions of abuses with a foundation in fact are subject to judicial inquiry, this Court has adhered to the fundamental tenet that the court's authority and process may not be abused.

In *United States* v. *LaSalle National Bank*, 437 U.S. 298 (1977), this Court had occasion to consider the contours of a district court's authority to prevent abuses of its process. The Court specifically recognized that the "good

faith standard will not permit the IRS to become an information-gathering agency for other departments, including the Department of Justice, regardless of the status of criminal cases." 437 U.S. at 317 (footnote omitted). As the Court observed, the IRS' authority to summon private papers is not inherent; it has only such authority as Congress bestowed upon it. 437 U.S. at 317 n.18. Thus, while recognizing a core set of requirements for enforcement of the summons, this Court wrote that "[t]hese requirements are not intended to be exclusive. Future cases may well reveal the need to prevent other forms of agency abuse of congressional authority and judicial process." 437 U.S. at 318, n.20.[4]

Just as the IRS does not have inherent authority to summon private papers, it has no inherent authority to compel compliance with a summons. Under 26 U.S.C. §7402, if the IRS desires to compel compliance with a summons, it must invoke the power and process of a district court. Once their process is invoked, the district courts necessarily have broad and inherent power "over their own process, to prevent abuses, oppression and injustice . . ." *Gumbel* v. *Pitkin*, 124 U.S. 131, 144 (1888). *See also S.E.C.* v. *ESM Government Securities, Inc.*, 645 F.2d 310, 316-17 (5th Cir. 1981); *Gluck* v. *United States*, 771 F.2d 750, 758 n.8 (3d Cir. 1985) (abuse of process rule in IRS summons cases has "clear judicial integrity overtones" and "deterrence of governmental misconduct is an important . . . consideration"). The placement of the power to enforce the summons in the judiciary was deliberate and did not "in any way purport[] to limit the power of the judiciary to choose an appropriate rule of decision in an enforce-

[4] Nothing in *United States* v. *Arthur Young & Co.*, 465 U.S. 805 (1984) restricts a district court's power or authority to prevent its process from being abused. The authority to prevent such an abuse is fundamentally different from the court's authority to create a work product immunity for an auditor's tax accrual work papers.

ment proceeding." *United States* v. *Friedman*, 532 F.2d 928, 937 (3rd Cir. 1976). Indeed, "the very fact" that enforcement of a summons is "entrusted to the judiciary" leads to the conclusion that the "court has the power to fashion appropriate rules as to the fairness of the enforcement order." *Id. See United States* v. *Columbia Broadcasting System, Inc.*, 666 F.2d 364, 368 (9th Cir.), *cert. denied*, 457 U.S. 1118 (1982) (relying upon analogy between enforcement of IRS summons and enforcement of third party subpoena in civil litigation.)[5]

The district court's order in this case is well within the authority recognized in *Powell* and *LaSalle*. The order merely provides that "[t]he documents delivered hereunder shall not be delivered to any other government agency by the IRS unless criminal tax prosecution is sought or an Order of Court is obtained." (Pet. App. 29a.) The order affects only disclosures to other government agencies, and is carefully tailored to the unique circumstances presented to the courts below. The purpose of the district court's order was to assure that the IRS not act as an information gathering agency for other branches of the federal government involved in unrelated civil litigation with the Church. That concern arose out of substantial evidence that government attorneys in unrelated civil litigation were seeking the very documents sought by

[5] In these respects, proceedings to enforce an IRS summons are little different than any other civil proceeding in the district court. Although there are many aspects peculiar to summons enforcement proceedings, there is nothing in Section 7604(a) which deprives the district court of its full panoply of power and authority to control the proceeding and its process. For example, both the district and appellate court here ordered a number of pleadings filed and kept under seal. Nothing in the statute mentions any authority to do so but no one could doubt the authority of the courts to issue such orders. Similarly, the district court ordered the IRS to explain to it the source of the transcripts of the tapes which the IRS submitted. No one could doubt the authority of the court to require the government to do so.

the IRS in these enforcement proceedings, that the IRS special agents seeking the documents here had ongoing discussions with the government attorneys in the unrelated civil litigation concerning these very documents, and that witnesses summoned by the IRS special agents were interviewed first by the special agents and then by the government attorneys in the unrelated civil litigation under the false impression that the administrative summons applied to the unrelated civil litigation. Transcript of hearing of April 29-30, 1985, *passim* and at 87.

The order does not interfere in the least with the IRS' mission either by threatening any delays or by holding out the prospect of "constant scrutiny and attack by the summoned party." (Pet. 14.) The order does not itself impair the IRS' ability to conduct tax investigations (Pet. App. 14) because such investigations are not dependent upon disclosures to other government agencies. Indeed, in opposing the order in the district court, the specific examples of concern articulated by the government principally centered upon requests for information from other federal agencies for the purposes of enforcing non-tax related federal laws.[6] Moreover, as the district court assured the government, if a disclosure were sought for the purpose of furthering the IRS investigation, the court would allow it expeditiously.[7] In such an event, any hypothetical delay would be non-existent or minimal. The decision below does not require that the application to the district court be on notice to any other party. In fact, the district court specifically left the question of notice to be addressed if such

[6] The order itself allows for disclosure if a criminal tax investigation is sought.

[7] To the extent there might be a need to seek to disclose the documents to another government agency for a purpose not relating to enforcement of the tax laws, any such delay is minimal and by definition does not affect the tax laws.

an application were ever made by the government. Transcript of hearing of June 10, 1985, pp. 11-12.

The government's argument would require that a district court is limited either to enforcing a summons without any restriction, or denying it in its entirety. Such an "all or nothing" approach is simply inconsistent with the inherent power of a district court over its own process. It reduces a district court to a ministerial role, forced to stand by silently even if its process is misused. It is particularly peculiar because the effect of an "all or nothing" rule will certainly be "nothing" in at least some cases. Such a rule, which would in fact provide the IRS with less information, is contrary to logic.

b. The government relies heavily upon the decision in *United States* v. *Barrett*, 837 F.2d 1341 (5th Cir. 1988), *petition for cert. pending*, No. 87-1705, without acknowledging the critical differences between the two cases. *Barrett* involved a restriction on the means by which the IRS could investigate the tax liability of the taxpayer, and not merely, as here, a restriction upon the IRS' disclosure to other government agencies of the contents of the very documents subject to the administrative summons. In *Barrett*, the taxpayer sought an order prohibiting the IRS from continuing to send letters to Dr. Barrett's patients advising them that Dr. Barrett was being investigated by the Criminal Investigative Division of the IRS and requesting documentation of fees paid to Dr. Barrett. 837 F.2d at 1343. *See also*, *Barrett* v. *United States*, 804 F.2d 1376, 1379 (5th Cir. 1986), *vacated*, 812 F.2d 936 (5th Cir. 1987). Barrett contended that these disclosures violated 26 U.S.C. § 6103. The issue was whether Barrett was entitled to a hearing on whether there had been a disclosure of "return information" in violation of Section 6103, and, if so, whether enforcement of the IRS summons should be conditioned in order to protect Barrett against unnecessary disclosure of the fact that he was under criminal investigation. *See, e.g.*, 837 F.2d at 1343 (*per curiam*)

and 1356 (Brown, J., concurring and dissenting). The restriction sought in *Barrett* thus was not limited to the IRS' dissemination of the contents of the documents sought in the summons, but rather would have applied to the *methods* the IRS could employ in its investigation. The order here affects only the very documents which the IRS will obtain as a result of the court's enforcement order, and only to the highly limited extent that it temporarily bars disclosure of their contents to other government agencies. It thus extends no further than to control the use of the district court's process itself, and is intended to prevent the IRS from functioning as an information-gathering agency for other federal agencies involved in civil litigation with the Church, under the special circumstances of this case. *Barrett*, on the other hand, presents a much more serious question concerning the power of a district court to withhold enforcement of a summons unless the IRS complies with restrictions on its tax investigation methods beyond use of the contents of the documents directly summoned.

c. Nothing in Section 6103 indicates that the statute was intended to displace the district court's authority to prevent abuse of its process or to allow the IRS to use its summons power to gather information for other federal agencies. *See United States* v. *LaSalle National Bank*, *supra*, 437 U.S. at 317-318. Section 6103 was enacted primarily to regulate and restrict access to tax returns and return information by the many governmental bodies and agencies that routinely had access to such information under the prior practice. Subsection 6103(a) states the general rule that "returns and return information shall be confidential" and shall not be disclosed except as authorized by Section 6103. *American Friends Service Committee* v. *Webster*, 720 F.2d 29, 70 (D.C. Cir. 1983); *Chamberlain* v. *Kurtz*, 589 F.2d 827, 835-36 (5th Cir.), *cert. denied*, 444 U.S. 842 (1979). Consistent with this policy, the district court included an appropriate provision to as-

sure that the IRS did not function as an information-gathering agency for the other federal agencies in unrelated litigation with the Church. At the same time, the district court assured the government that any disclosure to another governmental agency which is provided for by Section 6103 would be permitted.[8] Only if the district court refused to allow disclosure which Section 6103 permitted could it be said that the district court was acting inconsistently with Section 6103.

d. The government asserts that the Anti-Injunction Act, 26 U.S.C. § 7421(a), prohibits the district court's order. Section 7421(a) by its terms is not applicable here in that no suit was brought to enjoin "the assessment or collection of any tax," 26 U.S.C. § 7421(a), but rather the purpose of the Internal Revenue Service investigation was contested in a summons enforcement proceeding.[9] More

[8] The government's insistence (Pet. 17-18) that a civil damage action after an improper disclosure is the proper remedy ignores the obvious: a "damage remedy *after* the information is released fails to protect [the] right to confidentiality." *Tierney* v. *Schweiker*, 718 F.2d 449, 457 (D.C. Cir. 1983) (emphasis in original).

[9] In *United States* v. *First Family Mortgage Corp.*, 739 F.2d 1275 (7th Cir. 1984), relied upon by the government (Pet. 18), the summons enforcement action was voluntarily dismissed after the government obtained the documents but before the taxpayer intervened. The court held that the action was moot because the IRS had already obtained the summoned documents. Based on that finding, the court was of the view that the Anti-Injunction Act barred the taxpayer's attempt to stop the IRS from using the documents it had previously obtained; the taxpayer was, in fact, maintaining a suit. In *Black* v. *United States*, 534 F.2d 524 (2d Cir. 1976), the Anti-Injunction Act barred the suit because the lawsuit was in fact an independent suit to enjoin the IRS from continuing its investigation. *Lowrie* v. *United States*, 824 F.2d 827 (10th Cir. 1987), also relied upon by the government (Pet. 18), is equally unhelpful to the government. There the taxpayer filed a lawsuit the purpose of which was not merely to obtain return of documents from the IRS, but rather was "to head off action against him, of whatever nature by the IRS." 824 F.2d at 831 (footnote omitted). Here in contrast there is no purpose to "head off" IRS action: the IRS is free to pursue its investigation using the documents.

importantly, the order does not in any way restrain the assessment or collection of any tax. The IRS is free to pursue any legitimate investigation and certainly free to assess or collect any and all taxes it deems are due which in fact it has now done. "The manifest purpose of § 7421 (a) is to permit the United States to assess and collect taxes alleged to be due without judicial intervention, and to require that the legal right to the disputed sums be determined in a suit for refund." *Enochs* v. *Williams Packing Co.*, 370 U.S. 1, 7 (1962). *See also Bob Jones University* v. *Simon*, 416 U.S. 725, 736-37 (1974). The only purpose and effect of the order is to prevent the IRS from abusing the court's power to enforce the summons. The Anti-Injunction Act has no bearing whatsoever on the propriety of the order.

2. The Independent Evidence Issue Which The Petition Seeks To Raise Is Not Squarely Presented By The Record Before The District Court. Which Did Not Apply An Independent Evidence Rule.

The petition with respect to the crime-fraud issue devotes itself exclusively to an abstract discussion of law which is not squarely presented by the record in this case. Whatever the outcome of the debate, its resolution will have no effect on this case.

The district court held that it had the authority to review the contents of the privileged communications to determine the application of the crime-fraud exception. Following that ruling, the district court in fact reviewed the communications in detail with government counsel at the April 30, 1985 hearing. After hearing every argument the government chose to make, and after engaging in an extended colloquy with government counsel as to the merits of those arguments, the district court held the communications to be privileged. Not once during that argument on the merits did the government urge that the district court erred in the manner in which it addressed the issue. Not

once during that argument did the government make the simple statement that it thought the district court should review the complete communications rather than rely upon the portions highlighted and brought to the district court's attention by the government.

The government's quarrel is not with the district court's procedure, but rather with the tactical choice it made in the district court to submit to the court the transcripts of the tapes and to highlight only certain portions of what it believed to be evidence of crime or fraud on the tapes.

This dissatisfaction with its tactical choice first became evident when the government moved for reconsideration in the district court. The district court clearly and cogently denied reconsideration, refused to listen to the rest of the communication and refused to consider a proffered declaration, not because it believed it was barred by law from doing so, but because it found that the government had chosen to submit the transcripts and other materials and to proceed on that basis. The district court, in exercising its authority to control the proceedings before it and pursuant to Rule 7.16 of the Local Rules of the United States District Court for the Central District of California, found that because no reason was given why the argument and the materials were not included in the earlier arguments, it would deny reconsideration.

The government quite properly does not seek certiorari as to the district court's denial of reconsideration. Quite aside from the merits of the second issue presented by the petition, the reason the district court did not review the entire communication was simply because of a deliberate tactical choice made by the government in the district court. However much the government might regret that choice, its consequence hardly merits review by this Court.

For these reasons, the dissenters from the March 28, 1988 order vacating the grant of rehearing *en banc* would

have affirmed the district court judgment, notwithstanding their disagreement with the *en banc* court's disposition. As even the dissenters recognized, the dispositive issues in this case are: (1) whether the district court abused its discretion in finding that it was entitled to rely upon the government to highlight and focus the court's attention upon the critical portions of the two hours of tape; and (2) whether the district court abused its discretion in refusing to consider the belated declaration submitted for the first time on reconsideration where there was no explanation as to why the material could not have been submitted earlier and it clearly was available at the time of the April 30, 1985 decision.

Those two issues are both necessary and preliminary to any consideration of the question the government seeks to have this court review. Equally, the two questions are merely questions involving the routine application of established principles to the particular facts of this case. In short, the two questions hardly merit this Court's review.

3. The Independent Evidence Rule Is Necessary And Appropriate, And Is Consistent With Prior Decisions Of This And Other Courts.

Notwithstanding the circumstances presented here, the government urges review of the rule enunciated in *United States* v. *Shewfelt*, 455 F.2d 836 (9th Cir.), *cert. denied*, 406 U.S. 944 (1972). Under *Shewfelt*, once the claimant of the attorney-client privilege as to a particular communication has established all the required elements of the privilege, the party seeking to strip the privilege has the burden of making a *prima facie* showing that the particular communication was in furtherance of an intended or ongoing illegality and must do so, if at all, by evidence independent of the communication itself. This initial requirement that the government make the showing by evidence other than

the privileged document is supported by logic and the societal interests supporting the attorney-client privilege.

The attorney-client privilege protects "[c]onfidential disclosures by a client to an attorney made in order to obtain legal assistance. . . ." *Fisher* v. *United States*, 425 U.S. 391, 403 (1976). The attorney-client privilege serves important and vital interests in our society. The privilege exists because of "the necessity, in the interest and administration of justice, of the aid of persons having knowledge of the law and skilled in its practice, which assistance can only be safely and readily availed of when free from the consequences or the apprehension of disclosure." *Upjohn Co.* v. *United States*, 449 U.S. 383, 389 (1981), quoting *Hunt* v. *Blackburn*, 128 U.S. 464, 470 (1888). The purpose of the privilege is "to encourage full and frank communication between attorneys and their clients" to serve the broader public interests in the observance of law and the administration of justice. *Id.*

The privilege encourages clients not only to discuss their past acts but to seek advice concerning their future conduct. As the Ninth Circuit has noted, "the attorney-client privilege is central to the legal system and the adversary process. For these reasons, the privilege may deserve unique protection in the courts." *United States* v. *Hodge and Zweig*, 548 F.2d 1347, 1355 (9th Cir. 1977). The privilege, unlike many evidentiary rules, is not a response to concerns about the reliability of the evidence, but is designed to foster values our society deems important by safeguarding the confidentiality of the attorney-client relationship.

Courts quite properly have not permitted that expectation of confidentiality to extend to communications with attorneys designed to perpetrate present or future crime. For this reason, communications otherwise within the attorney-client privilege can be stripped of their privileged status upon a *prima facie* showing by the opponent of the

privilege that the otherwise privileged communications were in furtherance of a prospective or on-going crime or fraud. *See, e.g., Clark* v. *United States*, 289 U.S. 1, 15 (1933); *In Re Grand Jury Proceedings* [*United States* v. *Lawson*], 600 F.2d 215, 218 (9th Cir. 1979).

Once this rule is recognized, it inexorably follows that the initial showing must be made by evidence other than the privileged communication itself. Without such a requirement, any opponent of the privilege would by the mere invocation of the exception, force a detailed scrutiny of each and every attorney-client communication. The requirement serves as a necessary mechanism to separate those cases where there is truly reason to suspect that the attorney-client relationship has been misused from those cases where there is no such basis. Thus, the classic version of the independent evidence rule embodied in the common-law requires that "the Trial Judge must first determine that the government has made a *prima facie* case that the privilege does not apply because the communication was in furtherance of a crime or fraud. Only then should the Trial Judge look at the documents". S. Saltzburg & K. Redden, *Federal Rules of Evidence Manual*, at 359 (4th ed. 1986). *See also* Jones, *The Law of Evidence*, 21:18, pp. 795-96 ("There should be some independent proof of wrongful purpose; the mere suggestion of fraud does not afford sufficient ground for setting aside the general rule."); *United States* v. *Bob*, 106 F.2d 37, 40 (2nd Cir. 1939), *cert. denied*, 308 U.S. 589 (1939). As this Court stated in applying the independent evidence rule in an analogous context, "[w]hen that [independent] evidence is supplied, the seal of secrecy is broken." *Clark* v. *United States*, 289 U.S. 1, 15 (1933).[10]

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[10] *Clark* itself concerned the traditional privilege attaching to jury proceedings and the court considered the attorney-client privilege as an analogy. After finding that a similar crime-fraud exception applied to the juror's privilege, the court held the ex-

(footnote continued on following page)

The independent evidence rule is essential to prevent the attorney-client privilege from being eviscerated by the crime-fraud exception and to protect the judicial system from being overburdened by claims that the exception should be applied. A contrary rule which would require the federal courts, at both the trial and appellate levels, to engage in *in camera* review of any and all attorney-client communications upon the mere allegation of a party opposing the privilege of the exception's application, would be unjust and invite gross abuses. A party could require its opponent to open for court inspection its entire file of attorney-client discussions and frustrate the very purpose of the privilege. It would become a common litigation tactic for parties to seek massive discovery of attorney-client files, in the hope that the fear of disclosure of even innocent communications would provide a litigation advantage, perhaps in the form of inducement to abandon or settle litigation on unfavorable or unjust terms.

The onerous and negative effects of such a rule are reflected in the government's failure to clearly enunciate the rule of law which it would substitute for the independent evidence rule. If, as implicitly seems to be the case, the government's position is simply that the district and appellate courts *must in every case* review the entire communication, the consequences are clearly unacceptable from the perspective of the burden on judicial administration and preserving the core values underlying the privilege.[11]

(footnote continued from previous page)

ception applied because the "evidence of guilt is ample, without the happening in the jury room, to break down the claim of privilege, and thus let in the light." 289 U.S. at 18. In other words, *Clark* itself applied the independent evidence rule.

[11] The government is forced to adopt this extreme position because under any other rule it cannot prevail in this case. *See* Section 2, *ante*.

No doubt for these reasons, the government has pointed to no court which has endorsed an absolute requirement of review of the communications themselves. Rather, only a single court of appeals has specifically rejected the independent evidence rule and even that court does not *require* the district court to review the communications in each case. In *In Re Berkley & Co., Inc.*, 629 F.2d 548, 553 n.9 (8th Cir. 1980), the court approved of the *in camera* review of the disputed documents, as well as several hundred others, but did not establish a rule that either it or the district court is required to review the communications.

The other decisions relied upon by the government to show a purported division of view amongst the courts of appeals are no more helpful to its position. In *In Re Antitrust Grand Jury*, 805 F.2d 155 (6th Cir. 1986) the initial showing of a crime or fraud was made by evidence other than the communication sought. 805 F.2d at 168. The court, however, was of the view that before the communications were to be produced the district court must review them *in camera* to assure that each particular document fell within the exception. *Id.* Thus, in holding that the *in camera* review was mandated to determine the scope of the disclosure, the court observed that the review at that point "could have" assisted in determining whether a *prima facie* violation had been made. *Id.*

The other decisions cited by the government (Pet. 19-20), except one,[12] simply do not discuss the independent evidence rule. Thus, although it appears that the privileged documents were available for review by either the district

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[12] As the government correctly notes, one member of the Court of Appeals for the District of Columbia Circuit has expressed the view that "[i]n appropriate cases the subpoenaed material itself may provide *prima facie* evidence of a violation." *In Re Sealed Case*, 676 F.2d 793, 815 (D.C. Cir. 1982). *See In Re Sealed Case*, 754 F.2d at 403 (Mikva, J. concurring) pointing out that the discussion in *In Re Sealed Case*, 676 F.2d at 812-16, expressed only the views of the author of the opinion.

or appellate courts,[13] and were reviewed in some of the cases, the courts did not address the questions of whether a showing by independent evidence was made initially and/or whether such an independent showing is required. In at least two of the cases, the issue before the court concerning *in camera* review was the propriety of *in camera* submission of grand jury materials to the court rather than the propriety of reviewing the communications themselves. *E.g. In re John Doe Corp.*, 675 F.2d 482, 490 (2d Cir. 1982); *In re Special September 1978 Grand Jury II*, 640 F.2d 49, 56-57 (7th Cir. 1980).

In sum, the decisions do not reflect that the various courts have considered the independent evidence rule and its merits. All courts agree that there must be a *prima facie* showing. The Ninth Circuit requires that at least the initial showing that the communications were in furtherance of an illegal end be by evidence other than the suspect communication itself. No court has held that a court is required to initially review the communication itself.

The disparity, to the extent there is one, is minor and hardly of great consequence. This is particularly so because an opponent of the privilege can hardly complain with credibility of a misapplication of the exception to the privilege where they have been unable to produce even *prima facie* evidence. The requirement hardly imposes a very stringent burden to overcome. *See, e.g., In re Antitrust Grand Jury*, 805 F.2d at 165-166. In the absence of such a showing, an opponent of the privilege cannot credibly claim any injustice in upholding the privilege since it can hardly assert that it pressed the exception based on much more than idle suspicion.

The mere fact that opponents of the privilege have been able to invoke the exception successfully by independent

[13] *E.g. In re John Doe Corp.*, 675 F.2d 482 (2d Cir. 1982); *In re Grand Jury Proceedings (FMC Corp.)*, 604 F.2d 798 (3d Cir. 1979); *Union Camp. Corp.* v. *Lewis*, 385 F.2d 143 (4th Cir. 1967).

evidence puts to rest the government's argument that the rule eviscerates the exception. *See e.g., Shewfelt, Clark, Hodge and Zweig.* The fact that the government tried but failed to prove the existence of the exception by independent evidence in this case merely reflects the inadequacy of its evidence, and not a failure of the independent evidence rule.[14]

Nor does the independent evidence requirement conflict with the manner in which the validity of other claims of privilege are decided, as contended by petitioner. (Pet. 21.) For example, in *United States* v. *Nixon*, 418 U.S. 683, 713-14 (1974) relied upon by the government, (Pet. 21) the claim of privilege by the President was sufficient to render the materials presumptively privileged. It was only after the Special Prosecutor made a sufficient preliminary showing to rebut the presumption that an *in camera* examination of the subpoenaed material was appropriate. 418 U.S. at 713-14. The point, of course, of the court of appeals' opinion in this case was that the government did not make its *prima facie* showing. Whether the court of appeals would have deemed it appropriate to review the tapes at that juncture was an issue never considered or raised in the court below.

In *Kerr* v. *United States District Court*, 426 U.S. 394, 404-406 (1974), this Court indicated that an *in camera* review of certain files would be an appropriate manner of addressing a claim of governmental privilege because the nature and weight of the privilege there varied with the nature of the specific document and because of the required balancing between claims of irrelevance and priv-

[14] The government's reliance on *United States* v. *King*, 536 F. Supp. 253 (C.D. Cal. 1982) is misplaced. As the decision makes clear, there was ample independent evidence to apply the exception there. If anything, *King* illustrates the likelihood that where the attorney-client relationship is in fact abused, there will be ample evidence, other than the communications themselves, to make a *prima facie* showing.

ilege and the opponents' claim of need. Somewhat similarly, in *Halkin* v. *Helms*, 598 F.2d 1, 9 (D.C. Cir. 1978), the court observed that normally an affidavit claiming state secret claims is sufficient to sustain the claim of privilege. The *in camera* exploration was not of the content of the material sought, but rather of affidavits and testimony demonstrating that the claim of privilege was valid. Those proceedings, which the appellate court thought proper, were held only to prove the validity of the claim because of the showing of necessity for the information.

The government's attempt to draw support for its position from *Bourjaily* v. *United States*, —— U.S. ——, 107 S.Ct. 2775 (1987), is equally to no avail. *Bourjaily* concerned the showing which must be made before a co-conspirator's statement is admitted under Federal Rule of Evidence 801(d)(2)(E). In holding that the proponent of such a statement is not limited exclusively to reliance on independent review, but rather may also rely on the statement itself,[15] this Court relied on Federal Rule of Evidence 104(a). That rule provides that "[p]reliminary questions concerning . . . the existence of a privilege, or the admissibility of evidence shall be determined by the court. . . . In making its determination it is not bound by the rules of evidence *except those with respect to privileges*" (emphasis added). The Court held that Rule 104 (a) thus overrode prior existing non-constitutional evidentiary rule, *except those concerning privileges*, a point underscored by this Court. 107 S.Ct. at 2780.[16] Because

[15] This Court specifically declined to decide whether the showing could be made exclusively by reliance on the hearsay statement itself. 107 S.Ct. at 2781.

[16] The concern underlying the attorney-client privilege is quite different than that underlying the hearsay rules, which derives from the presumptive unreliability of out of court statements. *See Bourjaily*, 107 S.Ct. at 2781. The very purpose of the attorney-client privilege, in contrast, is to ensure the reliability of the client's statements to his attorney; the privilege is recognized because it serves and promotes this important societal value and interest.

Rule 104(a) and *Bourjaily*, specifically preserve pre-existing evidentiary rules with respect to the determination and application of privileges, they support the continued application of the independent evidence rule in determining the applicability of the crime-fraud exception.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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Dated: September 26, 1988

APPENDIX

Order of United States Court of Appeals

FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

Nos. 85-6065; 85-6105

D.C. No. CV85-440-HLH

ORDER

UNITED STATES OF AMERICA,

Petitioner/Appellee/
Cross-Appellant,

v.

FRANK S. ZOLIN,

Respondent/Appellee,

and

CHURCH OF SCIENTOLOGY OF CALIFORNIA and
MARY SUE HUBBARD,

Intervenors/Appellants/
Cross-Appellees.

Filed July 5, 1988

Before: Browning, Tang, Pregerson, Alarcon, Norris, Reinhardt, Beezer, Brunetti, Thompson and Leavy, Circuit Judges.

ORDER

The opinion published at 842 F.2d 1135 is amended to include the following concurrence:

Order of United States Court of Appeals

CONCURRENCE

NORRIS, Circuit Judge, concurring in the result:

I write separately to make it clear that I believe the independent evidence rule has been and should continue to be the law of the circuit. *See United States* v. *Shewfelt*, 455 F.2d 836 (9th Cir.), *cert. denied*, 406 U.S. 944 (1972). However, I cannot join the court's order because the majority has failed to make clear whether the order is a disposition on the merits, *i.e.*, whether it constitutes en banc authority that the *Shewfelt* independent evidence rule is the law of the circuit. If the order is intended to be a disposition on the merits, it is internally inconsistent because an en banc panel cannot both decide a case on the merits and vacate as improvidently granted the order of the full court authorizing it to decide the case.

(3)

No. 88-40

Supreme Court, U.S.
FILED
OCT 7 1988
JOSEPH F. SPANIOL, JR.
CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1988

UNITED STATES OF AMERICA, PETITIONER

v.

FRANK S. ZOLIN, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

REPLY BRIEF FOR THE UNITED STATES

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REPLY BRIEF FOR THE UNITED STATES

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1. a. Respondents suggest (Br. in Opp. 8-10) that the questions presented in this case are moot. These questions concern the enforceability of a summons issued by the IRS pursuant to an investigation into the tax liability of L. Ron Hubbard and others for tax years 1979-1983. While this case was pending in the Ninth Circuit, it was suggested to the court of appeals that another appeal concerning a different summons issued pursuant to the same investigation, *United States* v. *Author Services, Inc.*, 804 F.2d 1520 (1986), had been mooted by Hubbard's death on January 24, 1986. The Ninth Circuit rejected that suggestion and held that neither the appeal in *Author Services* nor the appeal in this case was moot, explaining that the civil elements of the investigation were not affected by Hubbard's death because the results of the investigation could affect

the tax liability of Hubbard's estate. *Id.* at 1522 n.1; Pet. App. 13a.[1] Respondents now suggest that this case has subsequently become moot, asserting that the civil audit of Hubbard's returns for the years in question has been terminated by the execution of IRS Forms 870 and therefore that there are no remaining IRS proceedings, either criminal or civil, that would justify enforcement of the summons.

This contention is without merit. It is based on an erroneous premise because the administrative actions taken by the IRS regarding Hubbard's civil tax liability have not ended the investigation. Rather, the controversy in this case remains live since the IRS has a continuing need for the summoned information in order to complete its investigation of Hubbard's tax liability (primarily with respect to whether fraud was committed) and of the possible criminal activity of other individuals connected with Hubbard (see note 1, *supra*).

Respondents contend that the IRS has resolved Hubbard's tax liabilities for the years in question, and therefore the information sought by the summons can serve no useful purpose. Clearly, however, this conclusion can be

[1] In addition to the continuing civil investigation, the government pointed out to the court of appeals that the criminal investigation was not ended by Hubbard's death because he was not the only target of the investigation; rather, the summons had been issued in furtherance of "a federal tax investigation involving various individuals connected with the Church of Scientology, including Lafayette Ronald Hubbard ('L. Ron Hubbard'), relating to possible criminal and civil violations of the Internal Revenue Code and related provisions" (Declaration of Special Agent Petersell in Support of Petition to Enforce Summons, para. 2, C.A. App. 21). See U.S. C.A. Reply Br. 22 n.12. Finding the existence of a continuing civil investigation of Hubbard to be sufficient to reject the mootness claim, the court of appeals did not discuss whether the existence of other unnamed targets of the investigation would also defeat the mootness claim.

correct only if the IRS has made a "final, irrevocable determination" (*United States* v. *Gimbel*, 782 F.2d 89, 93 (7th Cir. 1986)) as to Hubbard's tax liability; if the IRS remains free to make further determinations concerning that liability in response to new information obtained from enforcement of the summons, it is manifest that the enforcement action is not moot. But respondents' premise that Hubbard's tax liability has been irrevocably resolved is erroneous; it rests on an apparent misunderstanding of the IRS's procedures and terminology.

b. Respondents do not contend that Hubbard's tax liability for the years in question has been resolved by operation of law; indeed, the statute of limitations for tax years 1981-1983 was extended by agreement and does not expire until June 30, 1989. Rather, respondents contend that it is the operation of the IRS's own internal procedures that has mooted this case; respondents claim that the IRS has irrevocably terminated consideration of Hubbard's tax liability by its own actions in ending its audit and accepting executed Forms 870 for the years in question.[2] As described in Treas. Reg. § 601.105(b)(4), the execution of a Form 870 by a taxpayer reflects his agreement with the changes proposed by the examiner as a result of an audit. The regulation notes that "[a]s a matter of practice * * *, [such] waivers or acceptances ordinarily result in the closing of a case insofar as the Government is concerned." But an agreement with the findings of the audit examiner, even if it ordinarily results in the administrative "closing" of the case, does not irrevocably terminate the determination of the taxpayer's liability, and therefore it

[2] Although respondents state that Forms 870 were executed for the years 1979-1983 (Br. in Opp. 8-9), we are informed by the IRS that they were executed only for the years 1981-1983. No Form 870 was submitted by Hubbard's representative for the tax years 1979-1980 because no audit changes were made for those taxable years.

cannot operate to terminate the IRS's investigation and moot a summons enforcement action. All the Form 870 does is reflect an agreement as to the amount of tax liability, *subject to change in the event that new information is uncovered.*

First, the regulation upon which respondents rely plainly states that the execution of a Form 870 does not necessarily represent a final determination of tax liability. The "district director remains free to assess a deficiency" and the taxpayer "may still claim a refund" (Treas. Reg. § 601.105(b)(4)). Moreover, under IRS procedures, even the administrative "closing" of a case does not make further investigation of that case pointless. Rev. Proc. 85-13, 1985-1 C.B. 514, which implements the regulation upon which respondents rely, describes in detail the circumstances under which the IRS will reopen a closed case to make an adjustment unfavorable to the taxpayer. These include the discovery of "evidence of fraud," a substantial error, or other circumstances indicating that a failure to reopen would be a serious administrative omission. See *id.* at 515.[3]

A reopening due to the discovery of evidence of fraud is particularly relevant to the instant case because it is the possibility that the summoned documents in this case will yield evidence of fraud that is the primary reason why enforcement of the summons remains a live issue of considerable importance to the government. It was the suspi-

[3] The "closing" referred to in Treas. Reg. § 601.105 and Rev. Proc. 85-13 is to be distinguished from a "closing agreement" that is "final and conclusive" under Section 7121 of the Code. A "closing agreement" must be signed by all parties, and it can be signed on behalf of the IRS only by certain specified officers to whom this authority has been delegated. An examiner is not one of these delegated officers. See Rev. Proc. 68-16, 1968-1 C.B. 770. No "closing agreement" has been entered in connection with Hubbard's tax liabilities.

cion of fraud on the part of various individuals and entities connected with the Church of Scientology that, in large part, prompted the issuance of the summons at issue here. That original purpose for issuing the summons remains in force today because a final determination by the IRS regarding the existence of the suspected fraud should await a thorough examination of the documents sought to be obtained pursuant to the summons. If those documents demonstrate that Hubbard committed fraud in connection with his taxes for these years (and there is strong reason to believe that the documents do contain such evidence (see Pet. App. 23a-24a)), then other adjustments to Hubbard's tax liability for the years in question will be appropriate.

c. In any event, it is well established, even in contexts where the nonfraud aspects of a taxpayer's liability are more finally settled than they are by the execution of Form 870 or by the acceptance of the returns as filed, that controversies over summons enforcement remain alive because of the possibility that the investigation will reveal fraud. Section 6501(c)(1) of the Code permits an assessment to be made "at any time" in the case of a false or fraudulent return with the intent to evade tax. Thus, even if the statute of limitations on assessment had expired for the years in question, the IRS could still assert against Hubbard's estate additional income taxes and penalties grounded in civil fraud. See *Badaracco* v. *Commissioner*, 464 U.S. 386 (1984); see also *United States* v. *Powell*, 379 U.S. 48 (1964) (permitting enforcement of summons even though statute of limitations had expired).[4] In short, the

[4] Similarly, the issuance of a notice of deficiency and the consequent filing by the taxpayer of a Tax Court petition do not affect the IRS's summons authority, even though Section 6212(c) of the Code restricts the Commissioner's power to issue a second notice of deficiency. See *United States* v. *Gimbel*, 782 F.2d at 92-93; *United States* v. *Roundtree*, 420 F.2d 845, 847-848 n.3 (5th Cir. 1969); *National*

focus of respondents' suggestion of mootness—*i.e.*, the extent to which the nonfraud aspects of the IRS's examination have been completed—cannot extinguish the existence of a tax fraud investigation, and therefore the completion of the nonfraud aspects of an investigation do not moot a pending summons enforcement action.[5] Thus, for several reasons, respondents' suggestion of mootness is erroneous.[6]

2. Respondents argue (Br. in Opp. 14-15) that there is no direct conflict between the decision below and the Fifth Circuit's decision in *United States* v. *Barrett*, 837 F.2d

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Plate & Window Glass Co. v. *United States*, 254 F.2d 92, 93 (2d Cir.), cert. denied, 358 U.S. 822 (1958).

[5] Indeed, respondents' contention leads to an absurd and pernicious result. If the tentative completion of the nonfraud aspects of the investigation would bar further summons enforcement action, then this case would provide a blueprint for taxpayers to thwart legitimate tax fraud investigations. A taxpayer would have an incentive to take actions that serve no purpose other than to delay enforcement of a summons issued in furtherance of a fraud investigation if, as respondents maintain, his success in delaying enforcement long enough to allow completion of the nonfraud aspects of the investigation would require that enforcement efforts be halted.

[6] We note that, if respondents' suggestion of mootness were correct, the proper course of action for this Court would not be to deny certiorari, but rather would be to grant certiorari and to vacate the judgment below. See, *e.g.*, *United States* v. *Munsingwear*, 340 U.S. 36 (1950). While that action would eliminate the precedential value of the decision below, it would leave in place a direct conflict between *United States* v. *Barrett*, 837 F.2d 1341 (5th Cir. 1988), petition for cert. pending, No. 87-1705, and *United States* v. *Author Services, Inc.*, *supra*, on the validity of conditional enforcement of IRS summonses. It would also leave an apparent conflict between the Ninth Circuit's independent evidence rule described in *United States* v. *Shewfelt*, 455 F.2d 836, cert. denied, 406 U.S. 944 (1972), and the decisions of several other courts of appeals. See Pet. 19-20.

1341 (1988), petition for cert. pending, No. 87-1705, because of the differences in the conditions placed by the respective district courts on the enforcement of the summonses. But these differences do not affect the fundamental conflict between the two circuits on the general question whether any condition can be imposed on the enforcement of the summons. The Fifth Circuit in *Barrett* unequivocally held that "[t]he district court does not have the power to conditionally enforce the summons" (837 F.2d at 1350). Thus, there can be no doubt that the Fifth Circuit would have decided the instant case differently and would not have permitted the imposition of the restriction on disclosure of summoned material that was approved by the Ninth Circuit.

Similarly, the Ninth Circuit has expressly rejected the proposition that "the court is limited to either enforcing a summons or denying enforcement" (*United States* v. *Author Services, Inc.*, 804 F.2d at 1525), which is precisely the proposition upheld by the Fifth Circuit in *Barrett* (see 837 F.2d at 1350). Moreover, the Ninth Circuit stated that the decision in *United States* v. *Texas Heart Inst.*, 755 F.2d 469 (5th Cir. 1985), which was overruled in *Barrett*, was "sound," and the Ninth Circuit added that it agreed with *Texas Heart* that "a district court 'may require the IRS to abide by the disclosure provisions of the Internal Revenue Code before it enforces the summonses' " (804 F.2d at 1525 (quoting 755 F.2d at 481)). Thus, the Ninth Circuit is already on record as stating that it would approve the imposition of the same condition on enforcement that was ultimately rejected by the Fifth Circuit in *Barrett*. In sum, the conflict between the Ninth Circuit and the Fifth Circuit on the question presented here is irreconcilable. See generally Pet. 10-13.

3. Respondents assert (Br. in Opp. 17-19) that the validity of the Ninth Circuit's "independent evidence" requirement for the invocation of the crime-fraud exception

to the attorney-client privilege is not "squarely presented" (*id.* at 17) in this case. This assertion is clearly mistaken. As respondents note (*ibid.*), the district court did make a partial in camera examination of the contents of the disputed tapes, but that was not the basis for the court of appeals' decision that is the subject of this petition. The en banc court of appeals unequivocally stated that the rule of the Ninth Circuit is that, in order to invoke the crime-fraud exception, "the government must make a prima facie showing, independent of the communications involved, that the attorney-client communications were in furtherance of an intended or present illegality" (Pet. App. 2a). Accordingly, the court of appeals did not examine the contents of the tapes at all; the judgment below rests on the holding that, as a matter of law, the contents of the tapes could be not be considered in determining whether the crime-fraud exception applies (together with the attendant factual conclusion that the independent evidence here does not make such a prima facie showing (see Pet. App. 23a-24a)). As we explained in our petition (at 19-20), that holding conflicts with decisions in several circuits, and it is appropriate for the Court to grant certiorari to resolve the conflict.

To be sure, in the event that the judgment below is reversed on the ground that the independent evidence rule should not be applied, there will remain for consideration on remand the factbound question of whether the crime-fraud exception should be invoked in this case. That question, however, is not "preliminary" (Br. in Opp. 19) to consideration of the validity of the independent evidence rule; rather, it cannot be reached unless the independent evidence rule is rejected. We note that we disagree with respondents' assertion that this factbound question will be resolved on remand against invocation of the crime-fraud exception. We have consistently maintained that both the

partial transcripts provided to the district court and the complete tape recordings, which the government specifically requested the court to consider (see Pet. 6 n.3), demonstrate the applicability of the crime-fraud exception. In any event, that is a matter to be decided by the court of appeals on remand, and the prospect of a fact-bound dispute on remand provides no reason for this Court to refrain from resolving the conflict in the circuits on the broad legal question presented in the petition.[7]

For the foregoing reasons, and those stated in our petition, the petition for a writ of certiorari should be granted.

Respectfully submitted.

CHARLES FRIED
Solicitor General

OCTOBER 1988

[7] Although it is not appropriate to engage in an extended discussion of the merits at this stage of the proceedings, we note that respondents have misstated our position in one important respect. We do not argue for "an absolute requirement of review of the communications themselves" (Br. in Opp. 23) whenever requested by the government; we do argue that the court is not prevented from reviewing the documents in camera to determine whether the crime-fraud exception is applicable.

☆ U.S. GOVERNMENT PRINTING OFFICE: 1988—241-699/60703

Supreme Court, U.S.
FILED
DEC 14 1988
JOSEPH F. SPANIOL, JR.
CLERK

No. 88-40

In the Supreme Court of the United States

OCTOBER TERM, 1988

UNITED STATES OF AMERICA, PETITIONER

v.

FRANK S. ZOLIN, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

JOINT APPENDIX

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PETITION FOR A WRIT OF CERTIORARI FILED JULY 7, 1988
CERTIORARI GRANTED OCTOBER 17, 1988

In the Supreme Court of the United States

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JOINT APPENDIX

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UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 85-6065

UNITED STATES OF AMERICA, PLAINTIFF/APPELLEE

v.

FRANK S. ZOLIN,
CLERK OF THE SUPERIOR COURT, DEFENDANT/APPELLEE

CHURCH OF SCIENTOLOGY OF CALIFORNIA AND
MARY SUE HUBBARD, INTERVENORS/APPELLANTS

DOCKET ENTRIES

Date	Filings-Proceedings	
1985		
07-03	ASSIGNED DOCKET NUMBER. lu	nf
07-03	DOCKETED CAUSE AND ENTERED APPEARANCES OF COUNSEL. lu	
07-03	SENT BILLING LETTER. lu.	
July 20	Docket Fee Pd.	65.
07-29	Rec'd late Aplt's CADS. (CONFATT) 7/26/85.	vm
Aug. 9	FILED AS OF JULY 31, CERTIFICATE OF RECORD. 6/18	tu
Aug. 12	Recvd as of 7/29, ltr dtd 7/25, from Glenn L. Archer, Jr., Asst. Atty. Gen. and Michael L. Paup, Chief, Appellate Section re: notice of appearance for aple (USA) (casefile) 7/25 -rmc-	

Date	Filings-Proceedings
1985	
Sept. 23	Filed as of 9/16, aple's notice of appearance; John F. Murray, Acting Asst. Atty General and Michael L. Paup, Chief as counsel of record. (casefile) 9/12 -rmc-
OCT. 29	Recvd as of 10/28, ltr dtd 10/25, from Eric M. Lieberman, Esq., counsel for Church of Scientology of California address to Confatt Secty-CG re: I appeared for the intervenor (CSC) in the DC in this case, and will be appearing and probably arguing the case before the Ct of Appeals. I apparently was let off the list of attys to be included in the prebriefing conference. Please include me in the prebriefing conference call on 11/19/85. (confatt) 10/25 -rmc-
Nov. 22	Filed order (CONFATT, RGK) a further prebriefing conference will be held by telephone on Dec. 11, 1985, at 10:00 a.m. pacific time. gb
Dec. 19	Filed order (CONFATT, RGK) the Church and Hubbard shall file a brief of not more than 50 pages on or before Jan. 31, 1986; the US shall file an answering and opening brief of not more than 75 pages on or before Mar. 24, 1986; the Superior Court may file a brief of not more than 10 pages on or before Apr. 7, 1986; the Church shall file a reply and answering brief of not more than 50 pages on or before May 2, 1986; the US may file a reply brief of not more than 25 pages within 21 days of the service date of the Church's brief; and the parties shall serve each other with the principal briefs by overnight mail. aw

Date	Filings-Proceedings
1986	
Feb. 4	Filed aplts' (CSC & M.S. HUBBARD) mtn for ext of time to file opening brief and to adjust briefing schedule; affidavit of Edward Copeland. (Civatt) 2/3 -rmc-
Feb. 26	Filed order (BARNES) appeals 85-6065 and 85-6105 are consolidated. Intervenors' motion of Feb. 4 for an extension of time to Feb. 28 in which to file their opening brief is granted. The United States shall file its answering and opening brief by April 28. The Superior Court may file a brief by May 12. Intervenors' reply and answering brief is due on June 6. The U.S.'s reply is due within 21 days thereafter. No further extensions will be granted intervenors in the absence of extraordinary circumstances. The page limits of the 12/19/85 confatt order shall apply. jlc (SEE SECOND SHEET)
Mar. 3	Filed orig & 15 aplts' opening briefs (CSC & Hubbard) 49-pgs.; 5 Excerpts of Record. 2/28 ec
Mar. 10	CERTIFICATE OF RECORD for 85-6065 also applies to 85-6105 per Dominick Falzone, Central Cal DC. dmd
APR. 24	Filed as of 4/22 Aple/Crs-Aplt. Mtn. for extension of time for filing the government's brief & to adjust briefing schedule. (4/21) (CIVATT) ru
May 05	Filed Order (Dpty Clk GLK) The government's motion for an ext. time to file its combined opening and answering brief is granted. All due dates in the order of 2/26/86 are extended by seventeen days. dmd (85-&

Date	Filings-Proceedings
May 20	Filed mtn (USA) to file brief and supplemental excerpt of record under seal. 5/19 (CIVATT) ec
May 21	Filed mtn (Church of Scientology) to seal the combined answering brief for the US and supplemental excerpts of record; affidavit of Edward Copeland, Esq. 5/19 -Civatt- ec
May 22	Recd. notice of appearance of counsel for aple/x-aplt United States: Charles E. Brookhart and John A. Dudeck, Jr. jlc
May 22	Filed orig & 15 aple/x-aplt's briefs; 5 Supplemental Excerpts of Record (72 pgs) 5/15 (NOTE: MOTION PENDING FILED UNDER SEAL – NOT FOR PUBLIC) (Briefs on shelf) jlc *FILED UNDER SEAL*
May 30	Recvd as of May 23 ltr dtd 5/20 from Frederick R. Bennett re: Please advise the court that Aple Zolin believes that the issues in this litigation are adequately briefed by the real parties in interest . . . and waives his right to file a brief with the court. 5/20 (Civatt) vm
June 6	Filed order (BARNES) the parties' mtns to file the brief and supplemental excerpt of the United States under seal are granted. dmd
June 20	Filed Aplts' Church of Scientology and Mary Sue Hubbard motion for an ext of time to file answering and reply brief. Declaration of Edward Copeland. 6/19 (Civatt) vm
June 20	Filed Aplts' Church of Scientology and Mary Sue Hubbards' motion for an order requiring that a copy of the Declaration of C. Phillip Xanthos be provided to Aplt's. 6/18 (Civatt) v,m

Date	Filings-Proceedings
June 25	Filed order (Dpty Clk-GLK) aplt's mtn (Scientology, Hubbard) for ext. time until 7/10/86 to file answering/reply brief is granted. dmd
Jul 1	Recvd as of 6/30, from aple, ltr dtd. June 27, 1986, in response to Church of Scientology's mtn for order requiring copy of sealed declaration. (civatt) ec
JUL 17	FILED AS OF 7/11 ORIG. & 15 Intervenors/x-aplts (Church & Hubbard) REPLY & ANSWERING BRIEF. & FIVE SUPPLEMENTAL EXCERPTS OF RECORD. (55p) (7/10) (wrong color covers counsel notified) ru
July 18	Filed order (Mtn.Aty.-GLK) intervenors' mtn to compel the government to produce this document is denied as moot. dmd
July 18	Recd. corrections to aplt/x-aple (Church & Hubbard) reply & answering brief. (Records) jlc
July 21	Filed as of 7/16 Aplt's Church of Scien. & Hubbards' mtn to seal the answering brief. Declaration of E. Copeland. 7/10 (Civatt) vn
Jul 25	Filed USA mtn for ext of time for filing reply brief; declaration of cnsl. 7/24 -civatt- ec
Aug 6	Filed order (BARNES) aple/x-aplt's motion for 7/25, for a 28-day ext. of time to file the reply brief is granted. The brief shall be filed on or before 8/24. No further extensions will be granted. The motion of aplts/x-aples to file their answering and reply brief under seal is granted. jlc
Aug. 29	Filed aple/crs-aplt (USA) motion to file reply brief under seal. (CIVATT), 8/25. jw

Date	Filings-Proceedings
Aug. 29	Recvd orig & 15, aple/x-aplt (USA) reply brief in seal jiffy bag. (in vault) -rmc-
Sept 10	Filed order (BARNES) the govt's mtn to file reply brief under seal is granted. ec
Sept 10	Filed Reply briefs (USA) prev. recvd (stored in vault) ec
Oct. 20	RECVD ORIG DC FILE IN 3 VOLUMES; PLEADINGS VOLS. 1-3, (TO BE STORED IN RECORDS UNIT) -rmc- calendared NOV 6, 1986
Oct. 28	Filed Intervenor/Aplt's (Church of Scientology, Hubbard) suggestion of mootness. (10/27) (Panel) dmd
Oct. 31	Recvd ltr from aplt dtd 10/30 re: "this most recent development supports our position on mootness" . . . (Panel) dmd
Nov. 6	ARGUED & SUBMITTED TO BROWNING, GOODWIN, FARRIS. ec
Nov. 7	Recieved letter from aple (USA) dated 11/4 re: "The following statement is submitted in response to the Court's request for information regarding the briefs . . ." (PANEL) jlc
Nov. 7	Filed aple's (USA) response to suggestion of mootness. (11/4) (PANEL) jlc
Nov. 24	Filed aple's (USA) motion to file second supplemental excerpt of record under seal. (11/18) (PANEL) jlc
Nov. 24	Received 5 copies of aple's (USA) second supplemental excerpt of record. (11/18) (PANEL) jlc

Date	Filings-Proceedings
Dec. 2	Filed aplts' (Church of Scientology & Mary Sue Hubbard) opposition to aple's mtn to file second supplemental excerpt of record. (12/1) (PANEL) jlc
Dec. 15	Filed as of 12/12, aplts' motion to submit additional authority w/additional authority enclosed. (12/11) (PANEL) jlc
1987	
Jan. 10	Filed as of 1/8, mtn of Church of Scientology to submit additional authority w/authority attached. (1/7) (Panel) dmd
Jan. 14	Received as of 1/5, letter dated 12/31 from aple (USA) re: additional citations. (PANEL) jlc
Jan. 20	Received letter dated 1/16 from aple (USA) re: additional citations. (PANEL) jlc
FEB 9	ORDERED OPINION FILED (Farris) & JUDG TO BE FILED & ENTERED. ec
FEB 9	FILED OPINION (affirmed.) ec
FEB 9	FILED & ENTERED JUDGMENT. ec
Feb 18	Filed order (BROWNING, GOODWIN, FARRIS) the mtns to submit additional authority are granted, and the additional authorities are ordered filed as of the date of their receipt. dmd
Feb 18	Filed as of 1/05, additional authority prev. recvd. 1/5. dmd
Feb. 20	Filed mtn & order (DEP CLK: RMC) upon mtn of the aple/x-aplt (USA) it is hereby ordered that its mtn for an ext of time until 3/20/87, in which to file a petition for rehearing or petition for rehearing with suggestion for rehearing en banc is granted. -rmc-

Date	Filings-Proceedings
Mar. 03	Filed Order (BROWNING, GOODWIN & FARRIS) The motion of the United States to file a second supplemental excerpt of record under seal is denied. the clerk will return the second supplemental excerpt, already received, to counsel for the United States. jw
Mar. 03	Returned Second supplemental excerpts of record, per order of 3/3/87. jw
Mar. 24	Filed as of 3/20, (USA) mtn to file petition for rehearing under seal. (Panel) 3/19 -rmc-
Mar. 24	Recvd as of 3/20, original and 33, (USA) petition and suggestion for rehearing en ban. (15-pgs) (PANEL) 3/19 -rmc-
Apr. 2	Filed mtn of CHURCH OF SCIENTOLOGY OF CALIFORNIA AND MARY SUE HUBBARD to strike portion of gov't petition and suggestion for rehearing en banc. (Panel and All Active Judges) 4/1 -rmc-
Apr. 6	Filed Order (BROWNING, GOODWIN, & FARRIS) The Government's motion to file the petition for rehearing and suggestion for rehearing en banc, already received, under seal, is granted. It will be circulated to all active judges. jw
Apr. 6	Filed government's petition for rehearing previously received. (all active judges). jw
Apr. 13	Filed opposition to mtn to strike arguments on the "Crime Fraud" issue as set forth in the govt's petition and suggestion for rehearing en banc. (Panel and All Active Judges), served on 4/10/87. -rmc-

Date	Filings-Proceedings
May 4	Filed order (BROWNING, GOODWIN & FARRIS) the Church of Scientology of Calif. and Mary Sue Hubbard are requested to respond within 14 days of the date of this order to the substance of the discussion of the "crime-fraud" exception to the atty-client privilege that is contained in the US's petition for rehrg. and suggestion for rehrg. en banc. The response shall specifically . . . (see casefile) The response shall not exceed 15 pages. jlc
May 12	Filed aplts' Church of Scientology of California and Mary Sue Hubbard motion for an ext of time to file aplts' response pursuant to the order filed 5/4/87; declaration of Eric M. Lieberman. (PANEL), served on 5/11/87. -rmc-
May 21	Filed order (BROWNING, GOODWIN & FARRIS) aplts are granted an additional 7 days to file a response to the United States' petition for rehearing and suggestion for rehearing en banc pursuant to our order of 5/4. The response is due 5/25. jlc
May 26	Filed aplt's reply to petition for rehearing and suggestion for rehearing en banc (15 pgs) original + 33 copies. (5/22) (Active Judges) dmd
JUL 24	FILED CERT RECORD ON APPEAL ONE ENVELOPE EXHIBITS (UNDER SEAL). ec
Nov 6	Filed order (BROWNING, Chief Judge, GOODWIN, WALLACE, KENNEDY, ANDERSON, HUG, TANG, SCHROEDER, FLETCHER, FARRIS, PREGERSON,

Date	Filings-Proceedings
	ALARCON, POOLE, NELSON, CANBY, NORRIS, REINHARDT, BEEZER, HALL, WIGGINS, BRUNETTI, KOZINSKI, NOONAN, THOMPSON, O'SCANNLAIN, and LEAVY, CJJ) it is ordered that this case be reheard by the en banc court pursuant to Circuit Rule 35-3. The previous three-judge panel assignment is withdrawn. dmd
Nov 6	RE-OPENED CASE – JS/34 prepared. dmd.
Nov. 19	Filed order (BROWNING, ANDERSON, TANG, PREGERSON, ALARCON, NORRIS REINHARDT, BEEZER, BRUNETTI, THOMPSON, LEAVY) oral argument shall be held in San Francisco, on Thursday, Feb. 11, 1988 at 1:30 p.m. Each party shall prepare and additional brief, not to exceed fifteen pages, discussing the appropriateness of an independent evidence rule when applying the crime-fraud exception to the atty-client privilege.
Nov. 19	The parties shall file twenty copies of their original briefs and excerpt of record by 12/14/87. Cross-aplt shall file twenty copies of its supplemental brief by 12/30/87. Cross-aples shall file twenty copies of their supplemental brief by 1/14/88. -rmc- (SEE CASEFILE FOR THE REST OF THE ORDER)
Dec. 14	Filed aplt's (Church of Scientology of Calif. & Mary Sue Hubbard) 20 add'l copies of opening brief and excerpts,. (EN BANC PANEL). jw

Date	Filings-Proceedings
Dec. 14	Filed aplt/crs-aples (Church of Scientology of Calif. & Mary Sue Hubbard) 20 add'l copies of supplemental excerpts of record. (EN BANC PANEL). jw
Dec. 14	Filed 20 add'l copies of (Church of Scientology of Calif. & Mary Sue Hubbard) crs-aples answering/reply brief, (EN BANC PANEL). jw
Dec. 17	Filed as of 12/16, 20 add'l copies of reply brief of aple/crs-aplt's (UNITED STATES), (EN BANC PANEL). jw
Dec. 17	Filed as of 12/16, 20 add'l copies of aple/crs-aplt (UNITED STATES) answering/opening brief, (EN BANC PANEL). jw
Dec. 17	Filed 20 add'l copies of aple/crs-aplt (UNITED STATES) supplemental excerpts of record, (EN BANC PANEL). jw
1988	
Jan. 4	Filed 20 copies of aple/crs-aplt (UNITED STATES) suppl. brief on rehearing en banc. (EN BANC PANEL) 15 pages 12/30 (mtn. submitted to file briefs under seal. jw (orig & copies aside from what has been circulated to en banc panel has been placed on shelf)
Jan. 4	Filed aple/x-aplt's motion to file supplemental brief on rehearing en banc under seal. (12/30) (EN BANC PANEL) jlc
Jan. 11	Filed joint motion of cross-aples (Church of Scientology of CA & Mary Sue Hubbard) for ext. of time to file suppl. brief, (PANEL), 1/8/88. jw

Date	Filings-Proceedings
Jan. 14	Filed order (BROWNING) x-aples' mtn for an ext of time for filing their supplemental brief is granted. Their brief is now due 1/19/88. -rmc-
Jan. 21	Filed orig and 20 copies of x-aple's (Church of Scientology & Mary Sue Hubbard) suppemental brief on rehearing en banc, (EN BANC PANEL). 15 pgs, (1/19)
Jan. 29	Filed intervenors/aplts (Church of Scientology & Mary Sue Hubbard) motion to preclude Government counsel from quoting from or paraphrasing the contents of documents found to be privileged in the court below. (1/28) (EN BANC PANEL) jlc
Feb. 2	Filed Order (BROWING, ANDERSON TANG, PREGERSON, ALARCON, NORRIS, REINHARDT, BEEZER, BRUNETTI, THOMPSON & LEAVY, CJJ) Oral argument will begin on half hour earlier than originally scheduled. The argument is now scheduled for 1:00 p.m. on Thursday, February 11, 1988. jw
Feb. 10	Recvd letter dated 2/10, from M.L. Hertzberg and E.M. Lieberman re: Mr. John Dudeck, counsel for the government, informed our co-counsel, Edward Copeland, that the government would not be filing a written response to the mtn to preclude government counsel from quoting from or paraphrasing the contents of documents found to be priviledged in the ct below. (Limited En Banc Panel), served on 2/10/88. -rmc-
Feb. 11	CAUSE ARGUED AND SUBMITTED BEFORE: BROWNING, ANDERSON,

Date	Filings-Proceedings
	TANG, PREGERSON, ALARCON, NORRIS, REINHARDT, BEEZER, BRUNETI, THOMPSON & LEAVY, CJJ). ogm
Feb. 12	Filed Order (BROWING, Chief Judge, ANDERSON, TANG, PREGERSON, ALARCON, NORRIS, REINHARDT, BEEZER, BRUNETTI, THOMPSON, & LEAVY, CJJ) The Gov't's motion to have its supplemental brief on the rehearing en banc, originally Filed January 4, 1988, placed under seal is granted. The clerk is directed to place the brief under seal. Intervenors' motion to preclude government's counsel from quoting or paraphrasing the contents of the MCCS tapes during oral argument is granted. Government's counsel is ordered to comply with this restriction. jw
Mar. 3	Recvd letter dated 3/2/88, from Gary R. Allen, counsel for aple (USA) re: 5th Cir. en banc opinion in U.S. vs. Barrett (85-2054), served on 3/2/88 (EN BANC PANEL) -rmc-
Mar. 7[illegible]	Filed order/and dissent ANDERSON JOIN IN DISSENT, TANG, PREGERSON, ALARCON, NORRIS, REINHARDT, BEEZER DISSENTING, BRUNETTI, THOMPSON JOIN IN DISSENT and LEAVY) That portion of the three-judge panel opinion in United States v. Zolin, 809 F.2d 1411 (9th Cir. 1987), beginning with the first full paragraph on page 1418 to and including the last full paragraph in the second column on the same page, is ordered withdrawn. The

Date	Filings-Proceedings
	opinion of the three-judge panel will stand in all other respects. The order dated Nov. 6, 1987, that this matter be reheard en banc, is vacated as improvidently granted. -rmc- (FOR PUBLICATION)
June 27	Recvd copy of letter dated 6/22/88, from U.S. Supreme Court addressed to Mr. Fried re: your application for an ext of time within which to file a peition for a writ of certiorari has been presented to Justice O'Connor, who on 6/20/88, signed an order extending your time to and including 7/8/88. -rmc-
Jul 5	Filed Order for Publication (BROWNING, TANG, PREGERSON, ALARCON, NORRIS, REINHARDT, BEEZER, BRUNETTI, THOMPSON, AND LEAVY) the opinion published at 842 F.2d 1135 is amended to include the following concurrence. FILED JUDGE NORRIS CONCURRENCE. . . . . see text. -rmc-
Jul 18	Recvd notice from Supreme Ct of filing petition for certiorari, #88-40, filed 7/7/88. -rmc-

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 85-6105

UNITED STATES OF AMERICA, PETITIONER/APPELLANT

v.

FRANK S. ZOLIN,
CLERK OF THE SUPERIOR COURT, RESPONDENT/APPELLEE

CHURCH OF SCIENTOLOGY OF CALIFORNIA AND
MARY SUE HUBBARD, INTERVENORS/APPELLANTS

RELEVANT DOCKET ENTRIES

Date	Filings-Proceedings
1985	
July 18	DOCKET NUMBER ASSIGNED tl USA
July 18	DOCKETED CAUSE AND ENTERED APPEARANCES OF COUNSEL tl
Aug. 6	Filed as of 8/5, aplt's CADS. (CONFATT) 8/2 -rmc-
Aug. 8	Recvd as of 8/6, ltr dtd 8/2, from Glenn L. Archer, Jr., and Michael L. Paup re: notice of appearance for aplt. (casefile) 8/2 -rmc-
Sept. 23	Filed as of 9/16, aplt's notice of appearance; John F. Murray, Acting Asst. Atty General and Michael L. Paup as counsel of record. (casefile) 9/12 -rmc-

Date	Filings-Proceedings
Oct. 29	Recvd as of 10/28, in 85-6065, ltr dtd 10/25, from Eric M. Lieberman, Esq., counsel for Church of Scientology of California address to Confatt Secty-OG re: I appeared for the intervenor (CSC) in the DC in this case, and will be appearing and probably arguing the case before the Ct of Appeals. I apparently was left off the list of attys to be included in the prebriefing conference. Please include me in the prebriefing conference call on 11/19/85. (confatt) 10/25 -rmc-
Nov. 22	Filed in 85-6065, order (CONFATT, RGK) a further prebriefing conference will be held by telephone on Dec. 11, 1985, at 10:00 a.m. pacific time. gb
Dec. 19	Filed in 85-6065 order (CONFATT, RGK) the Church and Hubbard shall file a brief of not more than 50 pages on or before Jan 31, 1986; the US shall file an answering and opening brief of not more than 75 pages on or before Mar 24, 1986; the Superior Court may file a brief of not more than 10 pages on or before Apr 7, 1986; the Church shall file a reply and answering brief of not more than 50 pages on or before May 2, 1986; the US may file a reply brief of not more than 25 pages within 21 days of the service odate of the Church's brief; and, the parties shall serve each other with the principal briefs by overnight mail. aw
1986	
Feb. 4	Filed in 85-6065, aplts' (CSS & M.S. HUBBARD) mtn for ext of time to file opening

Date	Filings-Proceedings
	brief and to adjust briefing schedule; affidavit of Edward Copeland. (Civatt) 2/3 -rmc-
Feb. 26	Filed in 85-6065, order (BARNES) appeals 85-6065 and 85-6105 are consolidated. Intervenors' motion of Feb. 4 for an extension of time to Feb. 28 in which to file their opening brief is granted. The United States shall file its answering and opening brief by April 28. The Superior Court may file a brief by May 12, Intervenors' reply and answering brief is due on June 6. The US's reply is due within 21 days thereafter. No further extensions will be granted intervenors in the absence of extraordinary circumstances. The page limits of the Dec. 19, 1985 confatt order shall apply. jlc SEE 85-6065 FOR FURTHER PROCEEDINGS

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

No. CV85-0440-HLH

UNITED STATES OF AMERICA, PLAINTIFF

v.

FRANK S. ZOLIN,
CLERK OF THE SUPERIOR COURT, DEFENDANT

DOCKET ENTRIES

Date	NR	Proceedings
1-18-85	d	1. Fld Petn to enforce IRS SUMMS. Decl & Memo of P&A in suppt. thereof. Case may be ref'd to Mag Geffen for discv. LODGED OSC
*		
1-25-85	sh	2. OSC Resp Raul Acosta OSC on 2-25-85 10am. Copy of Ord with petition & the Attach be served promptly upon resp by IRS. Within 10 days resp shall fl & serve a written resp. Petitioner.
2-11-85	sh	3. Intervenors request for judicial notc intervenor.
2-11-85	sh	4. Intervenors not of oppo to petition to enforce IRS summons declrtn of Maria E. Stratton.

Date	NR	Proceedings
2-11-85	sh	5. Ex Parte applict to cont hrg on ord to S/C re petition to enforce IRS summons declrtn of Donald C. Randolph. Intervenor
2-11-85	sh	6. Declrnt of service Petitioners.
2-11-85	sh	7. Note of mot mot for leave to Intervene in oppo to petition to enforce IRS summons memo of P/A declrtn of Donald C. Randolph; exh. Intervenor.
2-11-85	sh	8. resp to OSC meno of P/A declrtn of Raul Acosta, exh resp
*		
1/23/85	llm	9. Notc of Related Case. Pltf.
2/7/85	llm	10. ORD (WMB) (HLH) transfring actn to cal of Judge HARRY L. HUPP for all fur proceedings. Case many be ref to Mag. Tassopulos for for discvry. CC ptys.
2/20/85	lp	11. MO: Govt havng expressed non opositn to mot to interven set for hrng 3/11/85, mot is takn off cal for said dat & is grntd. Intervenors opositn, if any, is to be fld & served on or b/f 2/26/85. hrng on OSC is cont'd to 4/1/85 10am to permit Intervenor to fil any additional documnts, wh must be fld on or b/f 2/26/85. clerk is directed to mail cpys of min ord to all ptys.
2/4/85	lp	12. Fld respondnet notc of related actn.

Date	NR	Proceedings
2/19/85	lp	13. Fld pltf opposition to applic to cont hrng on OSC.
2/21/85	lp	14. MO: Due ot crt's clerical error, hrng was inadvertantly set for 4/1/85. that clerical error is now correctd, hrng on petitn for Enforcement is set for 3/11/85 10am. Intervenor has untl 3/4/85 to fil any documnts.
2/19/85	lp	15. Fld pltf govt's reply to P/A sumittd on behalf of respondent.
2/21/85	lp	16. Fld intervenor ex parte applic to extend tim w/in wh opposition to petitn for enforcmnt must be fld. LODGED & d.
3/4/85	da	17. Opp to pet to enforce IRS;memo of Ps & As;declar of Maria E. Stratton;exh intvr Church of Scientology of CA.
3/6/85	da	18. Intvr req for disc, memo of Ps & As, declar of Donald C. Randolph intvr. Church
3-8-85	sa	19. Submission of Reporters Transcript of proceedings taken on 2-11-85.
		20. Resp to intervenors opp & supple declaration of Steven Petersell. USA.
3/11/85	da	21. Petition for enforcmnt. Crt rulngs written ord f/w.Disc req denied.Any gov't papers due no later than 3/15/85 and further church papers due 3/22/85 MO
3-6-85	sh	22. ORD Granting intervenor leave to fl documnt in excess of 35 pgs.

Date	NR	Proceedings
3-12-85	sh	23. Applic of non resident atty to appear in a specific case. Edward Copeland.
3-12-85	sh	24. Applic of non resident atty to appear in a specific case Eric Lieberman.
3-12-85	sh	25. NOtc of ruling to provide calif state Crts opportunity to appear or to otherwise intervene & ORD Set for Further hrg on 4-1-85 at 10am. IN event the state Superior Crt, Appellate Crt, or Supreme Crt for any reason seeks to intervene or otherwise assert a position, they may do so on or before 3-25-85
3-12-85	sh	26. INterim Ord re petition to enforce summons. INtervenors request to stay these proceedings is denied. The petition to enforce summons is Denied as to the following doc on the ground that sufficient relevancy to the IRS inquiry has not been shown. Intervenors discvry request is Deni Intervenors request for an evidentiary hrg on the good faith issu is granted. Bal of hrg is cont to 4-1-85 10am. & Calif Supreme Crt to intervene on or before 3-25-85 to express their position
3/18/85	da	27. Ex parte app for ord sealing petitioner's plea filed 3/15/85;declar of Donald C. Randolph intvr

Date	NR	Proceedings
3/18/85	da	28. ORD sealing petitioner's memo in resp to crts req & for part reconsideration of interim ruling
*3/15/85	da	29. Petitioner's memo in resp to crt's req & fr part reconsideration of interim uling petitioner USA (UNDER SEAL)
3/18/85	da	30. Stmt of non-intervention deft Sup Crt of the state of Cal.L.A., Co.
3/18/85	da	31. Crt ord docu filed 3/15/85 sealed & signs prop ord sealing dccu.. Pltf to submit declar by 3/22/85 re source of info as discussed on rcrd of the reporter MO
3/15/85	da	Reporters transcript of procs taken 3/11/85
3-21-85	sh	32. Petitioners notc re 4-1-85 hrg. 10am.
3-21-85	sh	33. MEmo of Petitioner oppo intervenors mot for sealing Ord & to Vacate Ord.
3-21-85	sh	34. Amended statmnt of Non Intervention. The Superior Crt of the State of Calif County of LA.
3/22/85	da	35. Stip & ORD that Frank S. Zolin be sub in this actn in place of Raul Acosta
3/22/85	da	Reporters transcript of procs taken 3/18/85
3/22/85	da	36. Reply to govnt's memo in resp to opp to petition for enforcement; Declaration of Barrett S. Litt:exhs intvr

Date	NR	Proceedings
*3-20-85	sa	37. Ex parte applic for leave to intervene; Declaration of Michael Lee Hertzberg; Declaration of Donald C. Randolph. Mary Sue Hubbard LODGED prop ord.
3/20/85	da	38. ORD that Mary Sue Hubbard is granted leave to intervene
3/21/85	da	39. Ex parte app to Mary S. Hubbard for leave to intervene is grnted. MO
3/28/85	da	40. Reply memo in supp of app for sealing ord; exh intvr
4/2/85	da	41. OSC re summons enforcement cont to 4/22/85 3:00PM
3/27/85	da	42. Joinder in intvr's reply to govn't memo in resp to opp to petition to enforce summons intvr Mary Sue Hubbard
4/1/85	da	43. Petition for enforcement to 4/8/85 10:00AM MO
4/11/85	da	44. Ex parte app for ord setting hrg on mtn to quash subp duces tecum, memo of Ps & As & supp declar petitioner
4/11/85	da	LODGED prop ord
4/16/85	lp	45. Fld ORD that hrng on mot to quash subp duces tecum is set for 4/18/85 4:15pm.
4/16/85	lp	46. Fld petitnr notc of mot & mot to quash subp duces tecum, 4/18/85 4:15pm
4/17/85	da	47. Resp to intvr's reply petitioner

Date	NR	Proceedings
*4/16/85	da	48. App & ORD of non-resident atty Michael L Hertzberg to appear in spec case designating Donald C. Randolph as local co-cnsl Mary Sue Hubbard
4/18/85	nm	49. Interventor's opp to mot to quash subp; memo of P&As & declar of Donald Raldopph & John Peterson in suppt.
		50. MO: Crt GRTS mot to quash subp D/T & signs Ord quashing subps D/T.
		51. ORD quashing subps D/T issd to Special Agts Xanthos, Lipkin & Petersell.
4/22/85	da	52. OSC re: enforcement of IRS summons is cont to 4/29/85 3:00PM MO
4/26/85	da	53. Surreply to Govnt resp intvr
4/30/85	da	54. ORD reconsideration denied as to exh 5G & 5I. IRS is entitled to inspect & copy exh 5K,5L,50, 5P & 60 & the summons is to be enforced as to those items. As to exh 5C,crt finds Crt's copy will remain sealed til aft appellate review then returned to Superior Crt.Docu shall not be delivered to any other govn't agency unless tax prosecution is sought or Ord of crt is obtained. This ord is stayed fr 60 days.
4/29/85	da	55. OSC re: enforcement of I.R.S. summons. Crt terminates hrg on taking

Date	NR	Proceedings
		evidence on the summons proc. Further hrg cont to 4/30/85 9:00AM
4/30/85	da	56. OSC. Petition fr enforcement of summons granted in part & denied in part purs to formal ord MO
4/30/85	da	57. List of exh & wit
5/2/85	da	58. Notc of change of address of atty intvr
5/6/85	da	Reporters transcript of procs taken 4/29/85 & 4/30/85
5/9/85	da	LODGED ord petitioner USA
5/9/85	da	50. Notc of mtn & mtn fr reconsideration of Crt's ORD of 4/30/85 returnbl 6/10/85 10:00AM & declar of C.PHilip Xanthes re MCCS tapes(UNDER SEAL) petitioner U.S.A.
5/15/85	da	51. Ex parte applic to strike petitioner's mtn fr reconsideration of crt's ord; Memo of law;declar of Donald C. Randolph intvr
5/15/85	da	LODGED ord (2) intvr
5/17/85	da	52. DENIED ord striking petitioners mtn fr reconsideration
5/17/85	da	53. Stip & ORD that Intvr's opp papers to min of petitioner fr reconsideration of Crt's ord be fld & served no later than 5/28/85. Petitioner's reply will be fld & served no later than 6/3/85

Date	NR	Proceedings
5-21-85	cw	54. ORD denying intervenor's ex parte appl.
5/24/85	da	55. Opp to petitioner's mtn fr reconsideration of crt's ord of 4/30/85 intvr
6/4/85	da	56. Reply to intvr's opp to mtn fr consideration pltf
6-10-85	lpc	57. MO: Crt ORD pltf mot for reconsdration of 4-30-85 denied;
6-18-85	sb	Reporter transcript of proceeding on 6-10-85
7/01/85	TS	58. Intrvnr's NOTC OF APPEAL to 9th Cir. C/A frm jdmt ent 4/30/85. Billed for docket fee.
7/15/85	TS	60. Petnr's NOTC OF APPEAL to 9th Cir. C/A frm ord ent 6/10/85. & NOTC OF CROSS APPEAL to 9th Cir. C/A from ord ent 4/30/85. Fees waived.
7/22/85	da	61. Transcript designation & ordering form
12/4/85	da	LODGED ord from 9th CCA that a further prebriefing conf will be held by telephone on 12/11/85 10:00AM Pacific Time.
1-10-86	sb	Lodged Order 9th Circuit C/A Church & Hubbard file brief not over 50 pages on or before 1-31-86, USA shall file ans * opening brief before 3-24-86 Superior Crt may file brief not more than 10 pages Church file reply ans brief 5-2-86

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

NO. CV-85 0440 WMB (Gx)

UNITED STATES OF AMERICA, PETITIONER

v

RAUL ACOSTA, ACTING COUNTY CLERK,
LOS ANGELES COUNTY, RESPONDENT

PETITION TO ENFORCE INTERNAL REVENUE SUMMONS, DECLARATION AND MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT THEREOF

Petitioner, United States of America, by and through its attorneys of record, Robert C. Bonner, United States Attorney for the Central District of California, and Charles H. Magnuson, Assistant United States Attorney, Chief, Tax Division, hereby petitions this Court to judicially enforce an Internal Revenue Service summons, a copy of which is attached hereto and marked as Exhibit 1.

1. This proceeding is brought under the authority of Sections 7402, 7602 and 7604 of the Internal Revenue Code.

2. Respondent's place of business is located in the judicial district of the Central District of California.

3. The Internal Revenue Service ("IRS"), an agency of the United States of America, is, and at all relevant times had been, conducting an investigation of possible criminal violations of the Internal Revenue Code and related provisions by Lafayette Ronald Hubbard during the period 1979-1983.

4. In connection with its investigation, the IRS has learned that certain materials in the custody of the Clerk

of the Superior Court of Los Angeles County in connection with the action *Church of Scientology of California v. Armstrong*, No. C 420153 (Super. Ct. L.A. County), may be relevant to the determination of whether any offenses connected with the administration or enforcement of the Internal Revenue laws have been committed.

5. On October 24, 1984, the IRS served the subject summons on John C. Corcoran, County Clerk for Los Angeles County by handing an attested copy to him. (Under California law the county clerk acts as clerk of the superior court in and for his county. Cal. Gov. Code § 26800.) Mr. Corcoran resigned as County Clerk, effective on or about November 30, 1984. Since that time, respondent has been duly appointed and authorized to serve as Acting County Clerk.

6. On November 21, 1984, agents of the IRS inspected and copied a portion of the summoned materials. On December 19, 1984, agents of the IRS inspected and copied an additional portion of the summoned materials. Respondent and his predecessor have refused, however, to provide for inspection and copying the following materials requested in the summons:

Exhibit No. (500 Ser.)	Description
DDDD (identified in summons as "4-D")	Handwritten note by L. Ron Hubbard ("LRH") regarding injuries and illness.
EEEE (4-E)	LRH handwritten note regarding control over mankind.
FFFF (4-F)	LRH handwritten note regarding psychoses.

Exhibit No. (500 Ser).	Description
GGGG (4-G)	LRH handwritten note regarding control over others.
GGGGG (5-G)	Document entitled "The Office of L. Ron Hubbard" regarding Scientology organization.
IIIII (5-I)	LRH letter regarding organization of the Church.
KKKKK (5-K)	LRH order regarding legal fees, 22 Jan. 1978 (2 pp.).
LLLLL (5-L)	LRH order regarding legal fees, 22 Jan. 1978 (1 p.).
OOOOO (5-O)	LRH note regarding the Mayor of Clearwater, Florida, 22 March 1978.
PPPPP (5-P)	LRH Statement regarding money from Scientology, 16 Feb. 1978.
BBBBBB (6-B)	LRH letter to Mary Sue Hubbard regarding control of the Church.
OOOOOO (6-O)	LRH handwritten note regarding the Fair Game Policy.

7. On November 21, 1984, respondent's predecessor, pursuant to the instant summons, had allowed the IRS agents to inspect and copy Exhibit 500-CCCCC, known as the "MCCS tapes." On November 26, 1984, the Church of Scientology of California ("the Church") and Mary Sue

Hubbard, intervenor in the *Armstrong* case, in response to the removal of a state court subpoena for the return of the copied materials, filed an application for Temporary Restraining Order with the District Court for the Central District of California, No. CV 84-9003-HLH(Bx). Pursuant to this Application, the District Court issued an Order on November 27, 1984 requiring the United States to place into the custody of the District Court clerk all materials copied from the records of the Superior Court on November 21, 1984, as well as all reproductions of such materials or notes reflecting their contents. A copy of this Order is attached as Exhibit 2. Between November 27, 1984, and November 29, 1984 all materials subject to the District Court Order were submitted to the Clerk.

8. On November 29, 1984, the Church and Mary Sue Hubbard also submitted an Application for Preliminary Injunction an [*sic*] the District Court proceeding and a hearing was held before District Judge Harry L. Hupp on December 7, 1984. Pursuant to that hearing, the Court issued an Order on December 10, 1984 (a copy of which is attached as Exhibit 3) allowing the United States to recover from the District Court Clerk all materials in his custody except those that were copies of materials that had been identified as remaining under seal in the Superior Court's Memorandum of Intended Decision. Such copies remain in the custody of the District Court Clerk pending further hearings to be held January 21, 1985. An inventory of the materials in the Clerk's custody conducted by counsel for the Church and counsel for the IRS revealed that the only such materials were copies of the MCCS tapes and notes reflecting their contents.

9. Neither the MCCS tapes nor any of the materials listed in paragraph 6 above are in the petitioner's possession or control.

10. There is no Justice Department referral in effect with respect to Lafayete Ronald Hubbard for the periods being investigated.

11. The IRS has followed all the procedural steps required by law.

WHEREFORE, petitioner prays for enforcement of the subject summons as follows:

A. That the respondent be ordered to appear and show cause before this Court why he should not be compelled by this Court, under Internal Revenue Code § 7604(a), to produce those items required by the summons which he has thus far refused to produce;

B. That respondent be ordered by the Court to appear before the Internal Revenue Service at a time and place to be determined by the Internal Revenue Service and then and there produce those items required by the summons which he has thus far refused to produce;

C. That it be determined that the subject summons is, and at all times has been, fully enforceable as to the MCCS tapes and that, accordingly, the Clerk of the Court should return to petitioner all materials remaining in the Clerk's custody pursuant to the Court's Order of December 10, 1984; and

D. That the Court grant petitioner its costs in this proceeding and such other and further relief as may be proper.

DATED:

Respectfully submitted,

ROBERT C. BONNER
United States Attorney
Charles H. Magnuson
Asst. United States Attorney
Chief Tax Division

/s/ Charles H. Magnuson
CHARLES H. MAGNUSON
Attorney for Petitioner
United States of America

Exhibit 1

SUMMONS

DEPARTMENT OF THE TREASURY
INTERNAL REVENUE SERVICE

Form 2039
(Rev. Jan. 1983)

In the matter of

LAFAYETTE RONALD HUBBARD

Internal Revenue District of Los Angeles
Periods 1979-1983

The Commissioner of Internal Revenue
To John C. Corcoran
At County Clerk, Los Angeles County

You are hereby summoned and required to appear before Special Agent, Steven Petersell an officer of the Internal Revenue Service, to give testimony and to bring with you and to produce for examination the following books, records, papers, and other data relating to the tax liability or the collection of the tax liability or for the purpose of inquiring into any offense connected with the administration or enforcement of the internal revenue laws concerning the person identified above for the periods shown.

The following materials in your custody in connection with the Church of Scientology of California v. Gerald Armstrong No. C420153 (Superior Court, L.A. County)

(See Attached List)

Business address and telephone number of Internal Revenue Service officer named above: 300 N. Los Angeles Street, Room 5016, Los Angeles, California (213) 688-3120

Place and time for appearance: at 300 N. Los Angeles Street, Room 5016, Los Angeles, California (213) 688-3120 on the 7th day of November, 1984 at 10:00 o'clock A.M. Issued under authority of the Internal Revenue Code this 24th day of October, 1984.

STEVEN J. PETERSELL	Special Agent
Signature of Issuing Officer	Title
[sig. illegible)	Branch Chief
Signature of Approving Officer (if applicable)	Title

Original to be kept by IRS **Form 2039 (Rev. 1-83)**

EXHIBIT # (500 Series)	DESCRIPTION
L	HCO POLICY LETTER OF 1 Sept. 66: "FOUNDER" (1 pg)
R	EXECUTIVE DIRECTIVE FROM L. RON L. HUBBARD-"CONFIDENTIAL LHR NO. 1 "DUTiES OF PERS SEC" July 12, 1968 (6 pgs)
S	S.O. ED 489 INT 18 Feb. 76 "RE: MY POST" & S.O. FLALG BUREAUX DATA LETTER 564 8 Dec. 75 "LRH PERSONAL PRO FUNCTIONS AND PUBLICS" (3 pgs total)
4-D	HUBBARD HANDWRITING RE: FEIGNING INJURIES AND ILLNESSES (See paperclipped section)
4-E	HUBBARD HANDWRITING ADMISSIONS RE: CONTROL OVER ALL MANKIND AND NAVAL BACKGROUND
4-F	HUBBARD HANDWRITING ADMISSIONS RE: PSYCHOSES
4-G	HUBBARD HANDWRITING ADMISSIONS RE: HUBBARD'S CONTROL OVER OTHERS
4-R 4-U, 4-V	RE: LETTERS TO L. RON HUBBARD, JR. 18 Nov. 80
5-A	FILE—"CONSTANTINE DIAMITIDES" CONTROL OF SCIENTOLOGY TO GREECE 1967 (whole file)
5-3	FiLE-NAAP-/APA/PSYCHOLOGY/PHYCHOTHERAPY/CANCEL CHURCH (whose file)

EXHIBIT # (500 Series)	DESCRIPTION
5-C	MCCS TAPES
5-D	CAL DOC INVENTORY – BLACK BINDER #361
5-E	HUBBARD EXPLORATIONAL COMPANY (whole file)
5-F	HANDWRITTEN RE: UNDATED RESIGNATIONS (1 pg)
5-G	"THE OFFICE OF L. RON HUBBARD" RE: SCIENTOLOGY COMPANIES (17 pgs)
5-H	"RESIGNATION AS TRUSTEE" (5 pgs)
5-I	LETTER FROM HUBBARD RE: ORGANIZATION OF CHURCHES (3 pgs)
5-J	CONFERENCE/PICK UP PROJECT WITH BOUDIN (8 pgs)
5-K	CHURCH TO PAY LRH LEGAL FEES 22 Jan. 78 (2 pgs)
5-L	CHURCH TO PAY LRH LEGAL FEES 22 Jan. 78 (1 pg)
5-M	HUBBARD RE: LEGAL STRATEGY 28 Jan. 78 (1 pg)
5-N	HUBBARD RE: FRENCH AFFAIR 16 Feb. 78 (4 pgs)
5-O	HUBBARD RE: FORCING MAJORY TO RESIGN 22 March 78 (1 pg)
5-P	HUBBARD SAYS DOES NOT RECEIVE $ FROM SCIENTOLOGY 16 Feb. 78 (3 pgs)
5-S	HUBBARD'S CONTROL OF U.S. MOVE (SCIENTOLOGY TO CLEARWARTER) (stapled pack of material)

EXHIBIT # (500 Series)	DESCRIPTION
5-T	HUBBARD/IRS 1959-61 TAX CASE (4 pgs)
5-V	FILE – "BOARD MINUTES AND LEDGER ITEMS"
5-W	RE: SO. 1 (on page 3) (3 pgs)
5-X	RE: OTC ACCOUNT (11 pgs)
5-Y	OTS FINANCES (23 pgs)
5-Z	CHURCH MONIES INTO HUBBARD SWISS ACCOUNTS (10 pgs)
6-A	SEQUENCE OF \ACTIONS FOR NEW BOARD OF C OF S OF CALIF. UK (6 pgs)
6-B	HUBBARD/MSH LETTER RE: CONTROL (35 pgs)
6-C partial	BLUD BINDER – "WHITE HOUSE/RUSSIANS"
6-E	HANDWRITTEN RE: FIND CRIMINAL PAST 31 Aug. 66 (2 pgs)
6-F	HANDWRITTEN RE: FIND UNSAVOR SIDE OF PAST 16 Aug. 66
6-H	HANDWRITTEN RE: HIT HARD WITH OUR STATEMENT/LIABILE AND SLANDER 16 Dec. 66 (24 pgs)
6-J	HANDWRITTEN RE: PINKERTON/FAIR GAME/BRAINWASHING Sept. 15 (13 pgs)
6-K	LETTER TO VIRGINIA – FAIR GAME May 17, 1952 (2 pgs)
6-L	HANDWRITTEN RE: OPEN UP A TOTAL WAR ON IRS GESTAPO TACTICS 17 June 65 (2 pgs)

EXHIBIT # (500 Series)	DESCRIPTION
6-M	HANDWRITTEN RE: DON'T DEFEND. ATTACK 6 March 63 (2 pgs)
6-N	HANDWRITTEN RE: POLICY ON SUITE ? MAXIMUM THREAT (3 pgs)
6-O	HANDWRITTEN TO BRAINMAN RE: FAIR GAME (1 pg)
6-P	RE: SUITE IS TACTICAL ? WE MUST ATTACK – 1968 (4 pgs)
6-Q	HANDWRITTEN RE: NEWS OF WORLD SUIT/FAIR GAME
6-R	HANDWRITTEN HUBBARD LETTERS – "DEAR CHIEF CONSTABLE"/ SLANDER IN NAME OF ORGANIZATION (5 pgs)
7-A	SHOWS: HUBBARD OWNED AND WAS RESPONSIBLE FOR PAYING THE CREW ON THE S.O. SHIPS "You keep on your books the sale price of St. Hill as a business." (9 pgs)
7-C	"RE" THE PR COUNCIL" – OMAR TO DO VIDEO (115 pgs) 29 Oct. 81
7-J	HUBBARD DISPATCH CONCERNING FINANCES 31 March 68 (4 pgs)

Additionally it is requested that you provide an index documents in the courts custody which were not marked as exhibits.

DECLARATION IN SUPPORT OF PETITION TO ENFORCE INTERNAL REVENUE SUMMONS

I, Steven J. Petersell, declare as follows:

1. I am a Special Agent with the Los Angeles District Director's office of the Internal Revenue Service, Criminal Investigation Division, and have been conducting criminal tax fraud investigations since 1977.

2. For the past five months, the Los Angeles Criminal Investigation Division has been conducting a federal tax investigation involving various individuals connected with the Church of Scientology, including Lafayette Ronald Hubbard (L. Ron Hubbard"), relating to possible criminal and civil violations of the Internal Revenue Code and related provisions. This investigation, which is still ongoing, has been conducted under the supervision of C. Philip Xanthos, CID Branch Chief, IRS, Los Angeles District Director's Office. During this investigation and in my capacity as a special agent the summons identified in paragraph 5 of the petition was served by me on October 24, 1984.

3. I have read the Petition to Enforce Internal Revenue Service Summons filed in this matter. Each of the items listed in paragraph 6 thereof, and identified in the summons (Exh. No. 1), as well as the MCCS tapes discussed in paragraph 7 thereof, is relevant to the investigation of L. Ron Hubbard in one or more of the following respects:

A. Determining the extent to which income from the Church of Scientology inured to the benefit of L. Ron Hubbard.

B. Determining whether L. Ron Hubbard conspired with others to impair and impede the Internal Revenue Service in the administration of the tax laws.

C. Determining whether any violations of the Internal Revenue laws were done willfully with intent to evade tax.

4. None of the materials listed in paragraph 6 of the Petition are in the possession of the IRS; nor, as a result of the Court's Order of December 10, 1984, are the MCCS tapes in possession of the IRS.

5. There is no Justice Department referral in effect with respect to L. Ron Hubbard for the years to which the summons relates.

Under penalty of perjury, I declare the foregoing to be true and correct.

Executed this 15 day of January, 1985 at Los Angeles, California.

/s/ STEVEN J. PETERSELL
STEVEN J. PETERSELL

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

No. 85-0440-HLH

UNITED STATES OF AMERICA, PLAINTIFF

v.

FRANK S. ZOLIN,
CLERK OF THE SUPERIOR COURT, DEFENDANT

CHURCH OF SCIENTOLOGY OF CALIFORNIA, INTERVENOR

Filed JUL 11, 1985

THE HONORABLE HARRY L. HUPP, JUDGE PRESIDING

REPORTER'S TRANSCRIPT OF PROCEEDINGS

Los Angeles, California

Monday, April 29, 1985
Tuesday, April 30, 1985

ROBERT F. STARK, CSR #5104
Official Court Reporter
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Los Angeles, California 90012
(213) 617-3273

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[80] * * * * *

THE COURT: Mr. Randolph?

MR. RANDOLPH: Your Honor, I wonder if the Court would allow other counsel to direct their comments to the tentative. I, of course, would like to take a couple of minutes with respect to the bad faith aspect. I will do it in whatever order –

THE COURT: Do it right now.

MR. RANDOLPH: All right.

THE COURT: That's the first part of this tentative ruling.

MR. RANDOLPH: Yes, Your Honor.

I am just going to take a couple of minutes and talk about three items that I think I would like to ask the Court to allow counsel to pursue. I will not rehash all of our arguments concerning what the standard is for bad faith. We presented that in our papers, and the Court has that before [81] it.

We have from the outset, Your Honor, argued that there is a collateral purpose to this investigation. That being to assist, to be an information-gathering agency for the Department of Justice, and in one particular circumstance not for the Department of Justice in a criminal investigation necessarily, but for the Department of Justice in two civil cases in which that Department is involved. And we have referred to those cases as the Linberg

case which is currently pending in the Central District, and the Founding Church case versus among other defendants the I. R. S. in Washington.

THE COURT: Mr. Randolph, I know you feel that way about it. But you spent an hour and fifteen minutes hammering away from Mr. Xanthos yesterday and you didn't get a word of confirmation of that.

MR. RANDOLPH: One of the problems with Mr. Xanthos, if I may, by his own admission, he didn't have the facts surrounding what occurred at the Holiday Inn. And I would like to just take a minute and give the Court the background and why Mr. Lipkin is a necessary witness in that regard.

In the summer of 1984 both the Linberg and the Founding Church cases were not going well for the Government. In the Founding Church case they had been ordered to produce 80,000 documents by the court in that case. In the Linberg case, in this court, the names and documents with respect to [82] the informants were ordered to be disclosed to counsel for the Church.

In June of 1984 the Government brought in, this again is in the Linberg case now, F. B. I. Agent, also attorney, named Thomas Dowdy. He was brought on the scene and assigned to the Linberg case.

At about the same time, Your Honor, you have Mr. Dowdy, you have these witnesses from the A. A. C., that's Advanced Abilities Center, located in Santa Barbara. The staff members of the A. A. C. are witnesses Reisdorf and Nelson who the Court has heard me talk about before. The A. A. C. is a struggling group of ex-Scientologists who are trying to establish themselves as an alternative to the Church of Scientology. They had proposed, and I understand their tax-exempt status is still under consideration. Reisdorf and Nelson were staff members and on the

payroll of the A. A. C. and necessarily interested in its, in the continued viability of that organization.

By the declarations that have been submitted to this Court by the I. R. S. agents, the witnesses Reisdorf and Nelson would not appear and cooperate with the Government in their investigation unless they were summoned to do so. The interviews were structured so that these witnesses would believe they were compelled to appear and cooperate both by the I. R. S. and the F. B. I. agents who were the [83] attorneys for the Linberg case. That is what arises from the circumstances.

Now, we know that the witnesses felt that they were compelled to talk to both agencies, because as I have submitted excerpts of their declarations, they testified that they believed that to be the case. They came to talk not only to the I. R. S. who had summoned them but they were led to believe that they had to talk to the F. B. I. agents/attorneys because they were compelled to do so by the summons.

In order to create this aura of authority to insure the cooperation of these witnesses, it was absolutely necessary to have coordination of these interviews so they would occur at the same place and at the same time. In order to do this, you had to have interagency coordination, and this did occur.

THE COURT: Mr. Randolph, let me ask you this: I think that you're missing the point I tried to make yesterday. We're talking about the bona fides of this summons as used to get information from the now on-going I. R. S. investigation. There's not an iota of evidence that this summons is being prosecuted for any reason other than to gather information for the on-going investigation. No indication it's being used to harass anybody. No indication it's being used out of personal spite. No indication that it's

being used for a collateral purpose. The I. R. S. tells me, no reason to [84] doubt it, that they are conducting a tax investigation of Mr. Hubbard for '79 to '83—'79 to '83?

MR. RANDOLPH: Yes, '79 to '83.

THE COURT: That this information is being—that this summons covers, this will be used for that investigation and is not being funneled to the Department of Justice, that no request for prosecution has been sent over to the Department of Justice.

Now, isn't that the only thing in front of me?

MR. RANDOLPH: Your Honor,—

THE COURT: Whether in some collateral proceeding somewhere else there was or was not questionable activity is not something that I don't think I want to find out about. Because it's got nothing to do with whether this summons is being pursued for inapplicable or inappropriate purpose. It's as simple as that.

Now, that was the basis of a number of evidentiary rulings I made yesterday. And it's the basis for this tentative ruling I've got here now. There is just nothing there. If on some prior occasion the civil end of the United States and the I. R. S. cooperated with themselves, with each other, in a way they should not have, which is what you're suggesting,—

MR. RANDOLPH: Absolutely, Your Honor.

THE COURT: —it's got nothing to do with what [85] I've got before me. You have to pursue that in some other forum where it would be a relevant item.

MR. RANDOLPH: Well, I understand. I think the record is very clear as to the Court's ruling in this regard. And I appreciate that.

THE COURT: I wanted to lay it out very clearly so that you are not in any doubt, so that if you and the Government take this tentative which has a little yes and a little no

in it up to the Ninth Circuit, they will know exactly what I thought.

For that reason, for you to tell me about all the mean things that have been done to the Church in the past, whether in Santa Barbara or anywhere else, just really isn't meaningful to me.

MR. RANDOLPH: I understand that, Your Honor. The reason I have been raising the Holiday Inn situation is to show that this administrative summons is part of the investigation which is being used to provide information to another government agency. And since if the investigation is being used for an improper purpose, and this administrative summons is a part of that investigation, then the administrative summons must fall or at least the Court has—

THE COURT: But from what I have heard, I don't believe that's the case. And I don't think there is any evidence that that's the case.

[86] MR. RANDOLPH: At any rate, Your Honor, that is the state of the law that we are—or the stated facts we are trying to—

THE COURT: You put Mr. Lipkin's boss and Mr. Petersell's boss on the stand yesterday for an hour. And did you see anything other than a supervising I. R. S. agent trying to do his job? I didn't.

MR. RANDOLPH: Well, Your Honor, what I saw was a gentleman when we got down, for instance, to the coordination of the Holiday Inn situation, he said I was not involved. Mr. Lipkin made those arrangements. But Mr. Xanthos said one other thing. He said I'm the one that selected the location. That being the Holiday Inn in Ventura. I suggest to this Court that it strains the imagination to believe that the I. R. S. could have selected a date and a place in Ventura, California, for interviews that the

Department of Justice, 3,000 miles away, happened to select the same place and the same date for their interviews of the same witnesses. There had to have been coordination, Your Honor.

THE COURT: Unless the witnesses wanted it that way. And I don't think I want to find out because I don't think it's relevant. Yes, it's entirely possible the witnesses wanted it that way.

MR. RANDOLPH: There could be a benign explanation.

THE COURT: But the point I'm making to you is that [87] I don't want to follow that trail because I don't think it's relevant to what I've got here.

MR. RANDOLPH: Well, I understand the Court's point.

There is one other area. That was my argument for asking for Mr. Lipkin's testimony. I think that in dealing directly with this administrative summons we get more to the heart of it with the evidence that was disclosed yesterday regarding the coordination between the attorneys for the Founding Church case in Washington, D. C., in which the I. R. S. is a civil defendant and counsel for the I. R. S., Mr. Cohen. Now, the timing of this is very critical, and there is just a couple of facts.

This administrative summons, if my memory serves—well, this administrative summons was served on I believe October the 21st. It contains a list of documents, Your Honor, on I'd say three, four pages of specifically-described documents.

At or about the same time as this administrative summons was served, you had a similar request coming from the Government attorneys in the Founding Church case that was served on counsel and was set for a hearing before Judge Breckenridge here in Los Angeles in which

the attorneys in the civil cases were asking for not a few documents which happened to coincide, a list of three or four pages, which [88] if you laid it on top of this one, and held it up to the light, the words would interface, Your Honor, a virtually identical list of documents. These lists were not—of exhibits and the description of these exhibits were not published anywhere, Your Honor. They were not part of a record from which they could have just taken them and attached them to their administrative summons. This was a list that was prepared by the I. R. S. There was coordination.

The unmistakable conclusion is that there was coordination between I. R. S. counsel and the Government counsel. And we know how that occurred from Mr. Xanthos' testimony yesterday, because he stated on September the 13th he had a communication with the Government counsel in the Founding Church case. That was Mr. Licht and Mr. Greenberg, if I'm not mistaken.

That subsequent to Mr. Xanthos' conversations with those two attorneys, he was aware of the fact that Mr. Cohen was speaking with them. My impression from the testimony yesterday was that Mr. Cohen began communications with those attorneys shortly after Mr. Xanthos had those communications in September 16th. I suggest to this Court that what you have here is an appearance that the I. R. S., who had access to the taxpayer information at that time, Mr. Xanthos testified that the Government counsel had access to their taxpayer information before this administrative [89] summons was prepared. Since it was prepared and served at least before October 21st, let's assume that they had them at—

THE COURT: Wait a minute, Mr. Randolph. What are you suggesting? That the Government is after these documents to turn them over to the Government lawyers handling the civil case?

MR. RANDOLPH: Absolutely. And we have raised a serious question as to whether Mr. Cohen who had the taxpayer information before him from which he prepared this list them made this list and this information available to Messrs. Greenberg and Licht who were, therefore, able to duplicate it and have a different—and go on a separate track to Judge Breckenridge.

THE COURT: Mr. Magnuson, is the Government willing to agree to an order, as part of the order enforcing the summons, that the documents are not to be delivered to any other branch of government unless and until criminal proceedings are requested?

MR. HORWITZ: Your Honor, under Section 6103 of the Internal Revenue Code, there are procedures by which another government agency if it seeks an ex parte application through a court can obtain a court order obtaining taxpayer attorney information.

THE COURT: Except by order of court. Is that [90] agreeable?

(Pause.)

MR. MAGNUSON: Your Honor, I would have to think about that. I'm not certain that it's always by court order. For example, I think if documents show the existence of a criminal act, that that might be circumstances under which the information could be available to another agency.

MR. HORWITZ: Your Honor,—

MR. MAGNUSON: That exception may also apply. Except, you know, I would state to the Court in absence of an exception to the disclosure rules, they will not be. Now, I don't know if that helps at all. And one of those exceptions may require a court order.

MR. HORWITZ: I think, Your Honor, in a situation where there is government—the Federal Government is involved in litigation that is not involved in a tax matter, it

can seek through a court order the I. R. S. text or taxpayer return information. I also think there are provisions where the I. R. S. if it obtains evidence of a criminal act can communicate directly to another governmental agency to alert it to the criminal act without a court order. There are specific provisions relating to how a communication may take place.

MR. MAGNUSON: I don't want to be too technical, Your Honor, but also in the exercise of their investigatory [91] process, if the use of what information is available to the agents is in their view appropriate to disclose to any other source for the purposes of obtaining further information, then under those circumstances, it is also allowed to be disclosed. So there are—you know, the Service has the opportunity in pursuing its case to use under certain circumstances information it does have.

THE COURT: Go ahead, Mr. Randolph.

MR. RANDOLPH: Your Honor, the bottom line of what I was speaking to with respect to communication between Messrs. Cohen and Greenberg is that the coincidental filing of this administrative summons and the identical list filed before Judge Breckenridge raises the specter that there was coordination between those agencies, since the I. R. S. attorneys were privy to the taxpayer information and the Government attorneys in the Founding Church case were precluded by law from being privy to that, it appears that there has been a violation of 6103, that there has been an exchange of information, and, therefore, raises the specter that the I. R. S. is simply attempting in this investigation and with this summons now to get the information for the Founding Church attorneys so that they, if they fail before Judge Breckenridge, well, they would have had two opportunities to get that same information. We can resolve this question once and for all by conducting a

brief period of [92] testimony from Mr. Cohen who apparently is the person who has that information. That was the second request I had for this Court, that I felt both Messrs. Lipkin and Cohen, the substantial questions remain in this investigation, and their testimony would be able to resolve an answer to those questions it appeared from Mr. Xanthos.

Finally, Your Honor, I would ask the Court to make an order as was just suggested, and in the terms that the Court just said, that there would be no such disclosure of these materials. I beg to differ with what Government counsel have stated is the state of the law with respect to Government disclosures.

There is no such arbitrary allowance for disclosures based upon the I. R. S. feeling that certain evidence may give rise to a crime of fraud. And if the Court has any question in this regard, I direct your attention to Section 6103, subsection 3, which talks about the form of a request in which information may be transmitted both from the I. R. S. to government counsel representing them in these proceedings and tax-related proceedings, and then in Section 4 talks about when the government counsel may then disclose it during the course of these proceedings.

And Section 3 definitively states that the only time in which the Secretary's authorized to disclose information to counsel is when there is a referral, when the [93] procedure is authorized by Chapter 76, which is not applicable, or if the Secretary receives a written request. They cannot cavalierly on their own disclose information. They must abide by Section 6103.

From the comments made by both counsel, I am alarmed and concerned that they have a different viewing of that. And it's for that reason I would ask the Court and urge the Court to impose such an order. So that there are

no further problems with disclosure of taxpayer information.

I thank the Court for listening to my comments.

* * * * *

[101] MR. HERTZBERG: Your Honor, after I have addressed waiver, I hope to convince you that the relevance theory before Judge Breckenridge was much broader than the one here, and that in fact you should find that under the issues that are before this Court, there is no relevance. But let me continue on the waiver matter first.

I would like to believe that if that issue had been reached by Judge Breckenridge, the waiver issue, as to 6-B, he would have found that there was no waiver, because the uncontroverted record before this Court and the same record was essentially before—well, it wasn't the same record before Judge Breckenridge. The uncontroverted record before this Court, Your Honor, shows that that document was purportedly obtained by Armstrong in an entirely different fashion and from an entirely different corpus of documents [102] than the ones that 5-K and the documents that Mr. Lieberman addressed were received from.

Now, I am not for a moment conceding that there was a waiver as to 5-K or any of Mr. Lieberman's documents. We maintain that under the law that general consent, quote, unquote, that Judge Breckenridge referred to is not the proper standard with all due respect to Judge Breckenridge, and that we are correct that there is not a proper waiver as to those documents. But as to this one, the facts are that that single document, 6-B, was obtained from what is called the controller archives, and the unrebutted affidavits of Mr. Licht, the attorney who was counsel for Mrs. Hubbard at the Armstrong trial. And from Mr. Vorm and his--the excerpts of the transcript,

some of which were submitted by the Government, ironically, in this case demonstrate that that 6-B document was in these controller archives. That the controller archives were a specific set of materials which Mrs. Hubbard had given explicit instructions that they contained materials personal to her, that those materials should be segregated out of the controller archives, not kept by the Church. They were not for the Church use. And that that procedure was being effectuated.

That Mr. Armstrong came along, and under a purported authority not granted by Mrs. Hubbard, not by Mrs. Hubbard, he inveigled Mr. Vorm to furnish him with Exhibit 6-B, and in [103] fact Mr. Vorm says in his entirely credible declaration that he attempted to reach Mrs. Hubbard to find out whether he could make an exception to the rule that she had given him not to make this available for Church or other use. He was unable to do so, and in the end, regrettably, he capitulated to the rather strong demands by Mr. Armstrong and furnished it to him.

Your Honor, that is not a waiver. And it is certainly not a waiver by Mrs. Hubbard. And as Your Honor knows from the Hugle case, which is the recent authority from the Ninth Circuit on the marital confidence, marital communications privilege, both spouses must waive. So even if Your Honor finds that the general, there was a general consent as Judge Breckenridge found flowing from the petition of Mr. Armstrong to Mr. Hubbard, Your Honor would also have to find in order to turn this 6-B document over to the Government, that Mrs. Hubbard knowingly waived, and I submit to Your Honor that on the state of this record, no such finding can be made whatsoever.

As to relevance, Your Honor, the Government in applying to Judge Breckenridge for access to 6-B posed two theories to Judge Breckenridge. One, they said that the documents they were seeking, including 6-B, was desired to demonstrate generally unclean hands of Mr. Hubbard and the Church directed towards the Government.

[104] The other theory which the Government relied on, in fact it was their major theory, was control. What did they mean by control? They meant that these documents, including 6-B again, demonstrated Mr. Hubbard's control of the Church. Well, that is exactly, in the most general and perfunctory fashion, the proffered reason offered in this case by the Government for access to that document. There is but a single –

THE COURT: Didn't they also argue that, and don't they argue here, that this document was written to Mrs. Hubbard not as a wife but as an officer of the Church?

MR. HERTZBERG: No, Your Honor. That was 5-K. Incidentally, for the record, Your Honor, I know Your Honor did not rely on that in rejecting –

THE COURT: No. I didn't put that down. I was trying to sort out which is which.

Go ahead.

MR. HERTZBERG: There is no authority for that proposition in the law anyway, but that was 5-K so the record is perfectly clear. That is not 6-B.

All we have in this record on 6-B, which is the document I am discussing, is a single passing statement by Mr. Petersell in one of his declarations, his other declarations in no way addresses the marital documents, interestingly enough. It addresses the attorney ones, but not the [105] spousal communication.

In the one attempt he made to show relevance, he says in Paragraph 2 of his March 8th declaration, this document may be relevant to the investigation and it relates to the control of the Church of Scientology organization. That's in Paragraph 7.

Now, Your Honor, I request Your Honor to bear in mind the Goldman case which Mr. Lieberman alluded to, where information, where documents dated one year

before the relevant tax period were not turned over pursuant to a summons request because the mere assertion of relevance for tax years outside the delineated period was insufficient. This document 6-B that we are talking about, was March, 1967. That is the date of that document. That spousal confidential document.

Your Honor, I would submit under the test that Your Honor followed the first time there was a hearing on this matter, where Your Honor was inclined to generally exclude all documents dated in the forties, fifties, and sixties, that this document comes within that general rule that Your Honor has already followed, and that when you add the Goldman case in here where we have a document now that's some fifteen years or more, my math is terrible, before the relevant, the earliest relevant time period under the Government theory of relevancy in this case or investiga[106]tion, that there—this document is not relevant. And when you also add on that their only—their mere assertion is on the issue of control, that is the very issue that Judge Breckenridge considered, and he rejected the Government's attempt because he found it be irrelevant. I won't belabor the point, Your Honor.

I do also want to point out, because I am disturbed at the thought that this confidential marital communication will be disclosed to the Government, this is a handwritten letter, Your Honor. It begins with a salutation from Mr. Hubbard to his wife in a term of endearment, and it concludes with a similar affectionate signing off, and it discusses in most part the most personal kind of matters. And to the extent that it does not discuss the most personal kind of matters, it discusses what are typically matters of concern between spouses. And I urge this Court to reconsider its tentative ruling with respect to 6-B.

THE COURT: Talk about 6-B, Mr. Horwitz.

MR. HORWITZ: Okay. First of all, Your Honor, one of the Government—as Mr. Petersell said in one of his declarations, the investigation involved in one part of it is to determine whether there was an attempt, a conspiracy to defraud the United States in part by claiming that Mr. Hubbard had no control or authority over the Church of Scientology.

[107] THE COURT: Excuse me. Is that a '68 document?

MR. HORWITZ: The conspiracy goes back.

MR. HERTZBERG: '67, Your Honor.

MR. HORWITZ: He said it was a '67 document, Your Honor. However, we have not seen it.

The conspiracy goes back to 1966, when Mr. Hubbard claimed he no longer had control over the Church, he was cutting himself off from all control of the Church or authority over the Church. And this document which occurs one year later from his wife may contain statements as to how he intends to continue to control the Church and how he continued to control the Church through later years.

THE COURT: I hadn't realized it was a '67 document. It will go in the not produced list without sufficient showing of relevancy.

All right. Any other comments you want to make, Mr. Horwitz?

MR. HORWITZ: Other than the 6-B document, Your Honor, which we feel is relevant because it occurs after Mr. Hubbard claimed he no longer had control over the Church, it may be evidence that he continued to have control over the Church, unless Your Honor is going to change any other parts of this tentative.

THE COURT: No. But I thought 5-G and 5-1 documents were outside the ten years before your tax years. [108] This one falls in the same category. It seems to

me the relevancy has got to be far too attenuated. So I will move that over to the same category as the other sixties documents.

MR. HORWITZ: Your Honor, just one point, Your Honor. I do not have the exact cite, but there is a case called—Circuit Court case called U.S. versus Dennis, where the court held the documents for several years before the alleged acts of a conspiracy in a criminal case that allegedly occurred would be allowed into evidence if they could show the person's motive or plan or his mind frame. And if the document from Mr. to Mrs. Hubbard shows Mr. Hubbard setting up organizations so he can control indirectly the Church, that would be relevant.

THE COURT: If that is taken as the only standard of relevancy, there is literally nothing that ever happened for forty years, thirty years, that's not relevant. On a previous occasion, when you weren't here, last March, we discussed the documents from the forties and fifties and also sixties.

All right. Anything else? Mr. Horwitz?

MR. HORWITZ: Just one—

THE COURT: Mr. Magnuson?

MR. HORWITZ: Your Honor, just one point for clarification.

THE COURT: Yes.

[109] MR. HORWITZ: In the order are you going to add that there will be no disclosure except pursuant to 6103 or anything specific?

THE COURT: I am going to tell you unless a criminal tax prosecution is sought or an order of court is obtained.

MR. HORWITZ: We would propose that since Congress is the one who set out the procedures under which disclosure could be made that if there is any prohibition, it should be—you know, that no disclosure will be made except as provided in 6103.

THE COURT: I am going to do it this way. Anything else, Mr. Magnuson?

MR. MAGNUSON: I would like to address that point Your Honor.

THE COURT: Certainly.

MR. MAGNUSON: I submit to the Court that there is no forum for allowance of such a ruling by a court. That if there is some disclosure that is some way improper, that may raise other issues. But we are here on a summons enforcement. Now, what is happening is there is a request by the Court ex parte almost at this point in time without ever suggesting to the Court that it has the authority to do so that it enter such an order restricting the use of the Internal Revenue Service of information it has. And I suggest to you that there is no authority for doing so. And it ought [110] not to be done.

THE COURT: I was told all through this case that this investigation is being conducted by the Internal Revenue Service pursuant to Internal Revenue considerations and not for other Department of Justice considerations.

MR. MAGNUSON: Yes.

THE COURT: And, therefore, isn't it logical that until the Internal Revenue Service is ready to go to the D. O. J. to ask for a criminal charge to be made, that it stay within the Internal Revenue Service?

MR. MAGNUSON: That may be ture, Your Honor, but you are now asked to enter an order directing what the Service should or should not do. And the law is already there as to what they should or should not do. And if they violate that law, there may be some other appropriate steps to be taken, but this isn't the place to do it.

THE COURT: I think I can—I think it's a reasonable place, Counsel, to be perfectly frank with you.

MR. HORWITZ: Could I refer you to the case of Stuckey versus the United States in which there were

allegations made by the taxpayer of bad faith because the Internal Revenue Service was coordinating an investigation with the Drug Enforcement Administration and apparently giving information to the Drug Enforcement Administration pursuant to requests made under 6103 and the court there held that even [111] if there were disclosures to other agencies, as long as they were done under the terms of 6103, that they were not improper and did not invalidate the summons since the I. R. S. had a tax purpose for the investigation. And we submit first the Court should not put a restriction on disclosure; and if the Court feels one is necessary, it should limit it to no disclosure except pursuant to 6103.

THE COURT: It seems to me that if you feel the need to disclose, you can go to court and ask for it.

MR. HORWITZ: But there are situations, Your Honor, where other government agencies, such as Congress, can make a request to the Internal Revenue Service for information.

THE COURT: If Congress asks you for it, I'll give you permission.

(Laughter.)

* * * * *

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

Civil No. 85-0440-HLH

UNITED STATES OF AMERICA, PLAINTIFF

vs.

FRANK S. ZOLIN,
CLERK OF THE SUPERIOR COURT, DEFENDANT

Civil No. 85-2253-HLH

CHURCH OF SCIENTOLOGY OF CALIFORNIA, INTERVENORS

UNITED STATES OF AMERICA, PLAINTIFF

vs.

AUTHOR'S SERVICE, INC., DEFENDANT

Filed June 18, 1985

THE HONORABLE HARRY L. HUPP, JUDGE PRESIDING

REPORTER'S TRANSCRIPT OF PROCEEDINGS

Los Angeles, California

Monday, June 10, 1985

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Los Angeles, California 90012

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[4] **LOS ANGELES, CALIFORNIA;**
MONDAY, JUNE 10, 1985; 11:00 A.M.

THE CLERK: Item Number 12. CV-85-0440. United States of America versus Frank S. Zolin. For petitioner's motion for reconsideration of the Court's April 30th, 1985, order.

Counsel, state your appearances, please.

MR. HORWITZ: Robert Horwitz, Assistant United States Attorney, appearing for the petitioner.

MR. MAGNUSON: Charles Magnuson, Your Honor, also appearing.

MR. RANDOLPH: Good morning, Your Honor, Donald Randolph on behalf of the Church of Scientology.

MR. COPELAND: Edward Copeland for the Church of Scientology of California.

MR. HERTZBERG: Michael Lee Hertzberg for Intervenor Mary Sue Hubbard.

THE COURT: All right. Mr. Horwitz, you have seen the tentative ruling?

MR. HORWITZ: Yes, Your Honor.

THE COURT: Let me have your comments on it.

MR. HERTZBERG: One comment first to apply to the motion with respect to the M. C. C. S. tapes, and that is I

believe, Your Honor, at the March hearing, as late as at the March hearing, the Government counsel had urged the Court [5] to listen to the M. C. C. S. tapes in camera before ruling.

THE COURT: Yes. That's what by reference here discussing it at one time. But by the time you got it up to hearing, in fact we talked about the possibility of the Church preparing the transcript for me and so on. But nothing ever happened about that. And we got up for hearing, and you had the declaration containing the quotation from it, and we argued the case on that basis. So what's there to do now by hindsight?

MR. HORWITZ: Nothing, Your Honor. Except we feel we did not waive our initial argument that—my understanding of the Court's ruling is that because we didn't present it again at the April hearing, you in effect believed that we waived our argument that the Court should listen to the tapes.

THE COURT: Certainly. You gave me partial transcripts. So we proceeded on that basis. That was the basis on which the case was argued, at some length I might add. I don't see that one, Mr. Horwitz.

MR. HORWITZ: Okay. Secondly, as to the second thing, the Court's restraining the I. R. S. from providing information even if it's requested by other governmental agencies under 6103 as our brief set out. Can I address this to both the Zolin and the A. S. I. cases since I believe the issue is in both cases?

THE COURT: If you are going to comment on it with regard to Author's Services, we better call that case and get their lawyer up here, too, because that's an issue in that case.

Let's call for the limited point of whether I. R. S. use of the material should be limited to tax investigation pur-

poses, call Number 11 also, U. S. A. against Author's Services, and get additional appearances on that case. I see Mr. Lenske over there. Will you state your appearance.

MR. LENSKE: Stephen Lenske appearing for Author's Services, Your Honor.

MR. HELLER: Lawrence Heller.

THE COURT: Mr. Randolph is in that case also.

MR. RANDOLPH: Yes. And Maria Stratton is also appearing for the Church of Scientology.

THE COURT: All right. Miss Stratton.

As you note, Mr. Horwitz, I have the same order, same tentative proposal for an order in Author's Services case as I put on the other case.

MR. HERTZBERG: Yes, Your Honor.

THE COURT: Now here you have respondents whose main fear or at least one of the main fears is that these materials are going to be used for other purposes.

MR. HORWITZ: Yes.

THE COURT: While the items that give rise to those fears don't have anything to do directly with the summons, [7] nevertheless, they have apprehension. The Government tells me we are not going to use it for the civil cases that the Church is involved in with the I. R. S., and it isn't going to be used for criminal purposes unless and until the matter is referred over to the Department of Justice for prosecution. Why does the I. R. S. complain, then, about an order which says okay, without court approval, you shan't give it to these people?

MR. HORWITZ: First of all, Your Honor, as to their fears, their fears, the fact that they may fear that something will happen is insufficient for the Court to enjoin someone from taking an action which is what the Court is doing.

Secondly, Your Honor, Congress has specifically set out certain conditions, situations—

THE COURT: Are the fears reasonable?

MR. HORWITZ: No.

THE COURT: Why not?

MR. HORWITZ: Because there has not been any showing that I. R. S. has given any information to other governmental agencies for other purposes.

Secondly, Your Honor,—

THE COURT: Why does the I.R.S. then object to an order which says ask me first?

MR. HORWITZ: For the simple reason—there are several reasons, Your Honor. First of all, the Court is not [8] only prohibiting disclosure which may be in violation of 6103 but prohibiting disclosures which are in total compliance with 6103. In fact, the Court is substituting its judgment for that of Congress as to when disclosures may be made and under what circumstances.

THE COURT: You come in here and you make an application which shows it's within the intent of Congress, you won't have any difficult from me.

MR. HORWITZ: Secondly, Your Honor, but the—Your Honor, the Court, as I have noted in our brief, like the Chemlon Products case, the courts cannot enjoin the United States from providing information to other governmental agencies which is in effect what this Court is doing.

Secondly, Your Honor, the Court's order in this regard also prohibits, will in effect make tax investigation more difficult because in other situations where a third party is requested to testify or give information to the I. R. S., it, too, may claim that we don't want to give you any information unless you enter into some type of agreement with us such as the Court ordered in Church of Scientology that you will not give any information to any other governmental agency or discuss it with anyone else without getting a court order or getting our approval. And this may in

effect multiply the number of summons enforcement actions.

THE COURT: I thought of that. I think that I [9] should make it clear that this order is in a sui generis case. The I. R. S. and the United States in general carrying on litigation with each other in innumerable places and courts. And it looks like it isn't going to abate from what I have seen. You don't have that in any other summons proceeding that I know of. It seems to me this is a sui generis case.

If you didn't have these various levels of litigation between the Government on the one hand and the Church on the other, then where there is fear that information acquired for one purpose may be in effect used for civil discovery in the other, I wouldn't think it necessary to make such an order. But this case is, therefore, not the typical case where you would routinely expect this kind of provision.

MR. HORWITZ: Your Honor, I beg to differ with you. The Stuckey, the Chemical Bank case, and some of the other cases that we cited involving 6103 question being raised, and all those proceedings they were involving, let us say, I. R. S. investigations of people who were allegedly engaged in illegal activities, such as drug dealing. And there was a realistic—there would be a realistic fear since there were ongoing Drug Enforcement Administration or U.S. investigations of people involved in illegal activities that since the I. R. S. was carrying on a tax investigation of that individual, that there may be a sharing of information. And the courts held that as long as it was [10] done under 6103, it was not improper that the I. R. S. would make a disclosure, and that was no need for limiting the summons.

THE COURT: If you come in here for permission and you come under the intent of the statute and the statute provides for it, then you will get your order.

MR. HORWITZ: There is another thing, Your Honor, and that is this: If, let us say, a—something like the Drug Enforcement Administration or F. D. A. or another Government agency begins a criminal investigation of, let us say, Mr. Hubbard and they request information from the I. R. S., we have to then disclose to them that we have received a request from the D. E. A. or the F. D. A., revealing to them that there is another investigation ongoing which the D. E. A. or F. D. A. at that time which may not want to reveal in public? In effect they would then be privy to whether or not there are other government investigations going on.

Also, Your Honor, if the information that we obtain, let us say, refers to contacts between the Church of Scientology or L. Ron Hubbard and another federal agency and the I. R. S. in its investigation here wishes to contact the Government agency referred to as having been in contact with the D. E. A. to—with the Church of Scientology, Mr. Hubbard, to find out the nature of the communication [11] and whether or not it is relevant, would they need a—

THE COURT: All I'm talking about is the items you get from the Superior Court. And in the case of Author's Service the items you get from them.

MR. HORWITZ: Yes. But if in the items there are references to meeting between either Mr. Hubbard or his representatives and let us say a representative of another state or federal governmental agency to talk about matters that may be relevant to the criminal investigation, would the I. R. S. have to get an order from this Court to contact that other agency to follow up on the lead contained in the material they get in the—through the A. S. I. or the Zolin?

THE COURT: I don't understand the question. We are not talking about I. R. S. gathering other information; we are talking about distribution of documents obtained from these summons.

MR. HORWITZ: But, Your Honor, let us say there is a document, a letter between Mr. Hubbard's representative and another federal or state agency and the I. R. S. contacts the person to whom the letter is directed and wishes to discuss with him what is discussed in the letter, and for purpose of that they have to, let us say, during the conversation, the person's memory is poor and they have to refresh it by showing him the letter, as often happens when you examine [12] a potential witness. Would the Government have to get an order from this Court for that purpose?

THE COURT: As it stands now, yes. To reveal the document for another purpose.

MR. HORWITZ: Would there also—

THE COURT: In other words, what I want the I. R. S. to do is in effect live up to what they told me their—is their intention, and that is gathering this information for the purpose of their tax investigation only. And that's why I'm doing this.

All right.

MR. HORWITZ: May I ask one question, Your Honor?

THE COURT: As a matter of law I want you to get the Ninth Circuit to tell me so.

MR. HORWITZ: May I ask one other question? If during the pendency of an appeal to the Ninth Circuit, there is a request from, let us say, another governmental agency for information from the—that was obtained pursuant to the A. S. I summons or due to information obtained through the A. S. I. summons, the Government has to in-

terview a witness who is an official of another agency, would an application to this Court be ex parte?

THE COURT: You won't even have the materials then, will you? I thought the last time counsel agreed that the order of this Court was stayed.

[13] MR. HORWITZ: Right.

THE COURT: Until – for sixty days, and then if there is a review sought during the pendency of the review.

MR. HORWITZ: Right.

THE COURT: So the question doesn't arise, does it?

MR. HORWITZ: Not that I'm aware of, Your Honor.

THE COURT: Okay. I'm going to leave that item in the order as it is.

Now, does that take care of U. S. A. against Zolin?

MR. HORWITZ: I believe it does, Your Honor.

THE COURT: Okay. As per tentative ruling.

* * * * *

Supreme Court of the United States

No. 88-40

UNITED STATES, PETITIONER

v.

FRANK S. ZOLIN, ET AL.

ORDER ALLOWING CERTIORARI. Filed October 17, 1988.

The petition herein for a writ of certiorari to the United States Court of Appeals for the Ninth Circuit is granted.

October 17, 1988

Justice Brennan took no part in the consideration or decision of this petition.

U.S. GOVERNMENT PRINTING OFFICE 1989 241-039/80022

(5)

Supreme Court, U.S.
FILED
DEC 15 1988

No. 88-40

In the Supreme Court of the United States

OCTOBER TERM, 1988

UNITED STATES OF AMERICA, PETITIONER

v.

FRANK S. ZOLIN, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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QUESTIONS PRESENTED

1. Whether, in the course of an action brought by the Internal Revenue Service to enforce a summons, the court may place restrictions on the disclosure of the summoned information.

2. Whether a prima facie case for the invocation of the crime-fraud exception to the attorney-client privilege must be established by independent evidence, or, alternatively, whether the applicability of that exception can be resolved by an in camera inspection of the allegedly privileged materials.

II

PARTIES TO THE PROCEEDING

In addition to the parties named in the caption, Mary Sue Hubbard and the Church of Scientology of California intervened in the district court and are respondents here.

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In the Supreme Court of the United States

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No. 88-40

UNITED STATES OF AMERICA, PETITIONER

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ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES

OPINIONS BELOW

The order of the en banc court vacating the order granting rehearing (Pet. App. 1a-9a), is reported at 842 F.2d 1135. The earlier order of the en banc court granting rehearing (Pet. App. 10a) is reported at 832 F.2d 127. The opinion of the panel (Pet. App. 11a-24a) is reported at 809 F.2d 1411. The March 12, 1985, interim order of the district court (Pet. App. 30a-32a), the April 30, 1985, order of the district court (Pet. App. 27a-29a), and the June 10, 1985, order of the district court denying reconsideration (Pet. App. 25a-26a) are unreported.

JURISDICTION

The judgment of the court of appeals was entered on February 9, 1987. A petition for rehearing en banc was granted on November 6, 1987 (Pet. App. 10a), and that

order was vacated as improvidently granted on March 28, 1988 (Pet. App. 2a). On June 20, 1988, Justice O'Connor extended the time to petition for a writ of certiorari to and including July 8, 1988. The petition was filed on July 7, 1988, and was granted on October 17, 1988. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTORY PROVISIONS INVOLVED

Sections 7602, 7604(a) and 7421(a) of the Internal Revenue Code (26 U.S.C.) are set out in a statutory appendix (App., *infra*, 1a-2a).

STATEMENT

1. In July 1984 the Criminal Investigation Division of the Internal Revenue Service (IRS) began investigating the tax returns of L. Ron Hubbard and others for tax years 1979 through 1983. Prior to the commencement of the investigation, Los Angeles newspapers had reported that former officials of the Church of Scientology had testified in *Church of Scientology* v. *Gerald Armstrong*, No. C 420 153 (Cal. Super. Ct.), that various Church of Scientology entities had transferred millions of dollars to Hubbard in the late 1970's and early 1980's. In October 1984, the IRS served an administrative summons on the Clerk of the California Superior Court, an office now occupied by respondent Zolin, seeking a number of documents in the record of the *Armstrong* case. The Clerk's office produced some of the documents, but it refused to produce 13 documents that had been ordered sealed by the Superior Court. The government then initiated this proceeding in the United States District Court for the Central District of California to enforce the summons. Pet. App. 12a.

Respondents Mary Sue Hubbard and the Church of Scientology intervened to oppose enforcement of the summons. They contended, inter alia, that the summons had been issued for the improper purpose of gathering information for use by other government agencies. After an evidentiary hearing, the district court rejected this contention. The court stated that the "Church has failed to raise any doubt of the good faith of the Internal Revenue Service in pursuing this summons enforcement proceeding" (Pet. App. 27a). The court explained that the summons was validly issued pursuant to a bona fide criminal tax investigation of L. Ron Hubbard and that the "agent issuing the summons was in good faith in doing so, and did not do so for an improper purpose, or to harass the taxpayer, or for a collateral purpose" (*ibid.*). The court therefore enforced the summons in part, ordering production of the five disputed documents that it found to be relevant and not privileged (*id.* at 28a). The court's order further provided that the documents produced "shall not be delivered to any other government agency by the IRS unless criminal tax prosecution is sought or an Order of Court is obtained" (*id.* at 29a).

The court also denied enforcement of the summons in part, ruling that eight of the documents were either irrelevant or privileged. In particular, the court ruled that Exhibit 5C, tape recordings of two meetings between various attorneys and representatives of L. Ron Hubbard and the Church of Scientology that are known as the "MCCS tapes," is protected by the attorney-client privilege. The government argued that the "crime-fraud" exception to the attorney-client privilege is applicable,[1] relying on affi-

[1] It is well established that the attorney-client privilege does not protect communications made in furtherance of a crime or fraud. To invoke this exception, there must be a prima facie showing that the client was engaged in or planning criminal or fraudulent conduct and that the attorney's advice was in furtherance of or closely related to the criminal or fraudulent activity. See, e.g., *Clark* v. *United States*, 289 U.S. 1, 15-16 (1933); *In re Grand Jury Investigation*, 842 F.2d 1223, 1226-1227 (11th Cir. 1987).

davits from an IRS special agent that contain partial transcripts of the tapes and that state that the excerpts and his discussions with former Church employees had given the agent reason to believe that the meetings were part of a criminal conspiracy to defraud the United States (see Pet. App. 23a-24a, 28a).[2] The court found that the government had not demonstrated the applicability of the crime-fraud exception, stating that "[t]he quoted excerpts tend to show or admit past fraud but there is no clear indication that future fraud or crime is being planned" (*id.* at 28a).

2. The government sought reconsideration of the court's rulings. In particular, the government requested the court to reconsider the provision in its enforcement order that prohibits the IRS from disclosing the summoned information to any other governmental agency without obtaining advance approval from the district court. The government argued that the court's role in a summons enforcement action is limited to granting or denying enforcement, and does not extend to imposing

[2] The affidavits allege that the taped meetings, part of the MCCS (Mission Corporate Category Sortout) Project, "focused generally on the intentional violation of the tax laws," specifically, "i) a proposed scheme whereby the Church's cash transfers to Hubbard would be disguised as payments for services rendered (allegedly to insulate Hubbard from tax liability and to protect the Church of Scientology's tax-exempt status), and ii) a proposed scheme whereby Hubbard would be able to control royalty income • • • without that control being traceable to him" (Pet. App. 23a-24a). In separate litigation, the Tax Court has found that the Church of Scientology engaged in a conspiracy, which lasted from 1969 until at least 1977, to defraud the IRS and obstruct lawful IRS tax administration functions. See *Church of Scientology* v. *Commissioner*, 83 T.C. 381, 429-443, 504-506 (1984), aff'd, 823 F.2d 1310 (9th Cir. 1987), cert. denied, No. 87-1377 (May 16, 1988). The Tax Court concluded that "criminal manipulation of the IRS to maintain its tax exemption • • • was a crucial and purposeful element of [the Church's] financial planning" (83 T.C. at 504 (footnote omitted)).

restrictions on the disclosure of lawfully summoned documents. The court denied the motion for reconsideration, explaining as follows (Pet. App. 26a): "Since the entire basis of the summons proceeding was to obtain material for a tax investigation, the court thinks it reasonable to restrict the use of the material for that purpose, unless a criminal prosecution is instituted. If exigencies of other litigation make it necessary, the IRS is free to make its case for an exception to this court."

The government also asked the court to reconsider its holding that there was insufficient evidence that the crime-fraud exception applies to the claim of attorney-client privilege for the MCCS tapes. In particular, the government noted that the district court apparently had reviewed only the partial transcripts of the MCCS tapes and had not actually listened to the tapes in full. In support of the motion, the government submitted the sealed Declaration of C. Philip Xanthos, Chief of the IRS Criminal Investigation Division, who stated that he had listened to the two MCCS tapes in full and that the partial transcripts reviewed by the court were very incomplete. Branch Chief Xanthos stated that he specifically recalled two discussions involving lawyers recorded on the MCCS tapes that involved the planning of future crimes and fraudulent acts against the IRS. See May 5, 1985, Government's Motion for Reconsideration of Order of April 30, 1985, with attached Declaration of C. Philip Xanthos. The court denied the government's motion and declined to listen to the tapes in full, stating that, while "at one time [listening to the tapes in full was] discussed with counsel, thereafter Mr. Petersell's declaration was submitted, and no one suggested that this was an inadequate basis on which to determine the attorney-client privilege" (Pet. App. 25a-26a).[3]

[3] The record refutes the district court's suggestion that the government did not timely request the court to listen to the tapes in full. The

The court added that "Mr. Xanthos' declaration stands on a similar footing; no reason is suggested why it could not have been submitted as part of the materials considered in the April hearings" (*id.* at 26a).

3. A panel of the court of appeals affirmed (Pet. App. 11a-24a). The court rejected the government's contention that the district court had exceeded its authority in a summons enforcement proceeding by imposing limitations on the IRS regarding disclosure of the summoned information (*id.* at 18a-19a). Relying on its prior decision in *United States* v. *Author Services, Inc.*, 804 F.2d 1520 (9th Cir. 1986), which in turn had relied upon *United States* v. *Texas Heart Inst.*, 755 F.2d 469, 481 (5th Cir. 1985),[4] the court concluded that a "district court may, when appropriate, condition enforcement of a summons on the IRS' agreeing to abide by disclosure restrictions" (Pet. App. 19a).

The panel also affirmed the trial court's ruling that the crime-fraud exception is not applicable to the MCCS tapes (Pet. App. 21a-24a). Citing *United States* v. *Shewfelt*, 455 F.2d 836, 840 (9th Cir.), cert. denied, 406 U.S. 944 (1972), the panel explained that circuit precedent had established the rule that the crime-fraud exception could be invoked to justify disclosure of otherwise privileged communications

pleadings filed with the court, together with the Petersell declarations on March 8 and 15, 1985, specifically show that the government requested the court to listen to the tapes themselves if the court concluded that the partial transcripts and the special agent's declarations did not sufficiently demonstrate the applicability of the crime-fraud exception. See March 8, 1985, Government's Response to Intervenor's Opposition at 6; March 15, 1985, Petitioner's Memorandum in Response to Court's Request and for Partial Reconsideration of Interim Ruling at 11.

[4] *Texas Heart* was later overruled by the en banc Fifth Circuit in *United States* v. *Barrett*, 837 F.2d 1341 (1988), petition for cert. pending, No. 87-1705. See pages 38-40, *infra*.

only where the government establishes " 'a prima facie case of fraud *independently* of the said communications' " (Pet. App. 21a, quoting 455 F.2d at 840 (emphasis in original)). While noting that "*Shewfelt*'s independent evidence requirement ha[d] been strongly criticized" and rejected by other courts, and that another Ninth Circuit decision, *United States* v. *Friedman*, 445 F.2d 1076, cert. denied, 404 U.S. 958 (1971), had "implicitly recognized that a district court may examine the disputed communications themselves in order to determine the applicability of the 'crime-fraud' exception," the panel concluded that it was bound to follow the independent evidence rule of *Shewfelt* unless that case was overruled en banc (Pet. App. 22a-23a). Applying that rule, the panel concluded that the independent evidence in this case, consisting of the special agent's declarations describing his conversations with former Church employees (but not the partial transcripts of the actual MCCS tapes themselves), "while not altogether insubstantial, [was] not sufficient to make out the requisite prima facie showing of intended illegality" (*id.* at 23a-24a).[5]

4. The court of appeals ordered the case to be reheard en banc (Pet. App. 10a). Following supplemental briefing and oral argument, however, the en banc court entered an order vacating "as improvidently granted" the previous order granting rehearing en banc (*id.* at 1a-2a). The order explained that there is no conflict between *United States* v. *Shewfelt*, *supra*, and *United States* v. *Friedman*, *supra*, because *Friedman* did not discuss whether there was an in-

[5] Because of its reliance on the independent evidence rule, the panel did not address either the sufficiency of the in camera showing considered by the district court or the question whether the district court should have examined the entire contents of the tapes, rather than merely the partial transcripts initially submitted by the government. See pages 5-6 & note 3, *supra*.

dependent evidence requirement. The en banc court confirmed that *Shewfelt* is the law of the circuit on this point, holding that "the government must make a prima facie showing, independent of the communications involved, that the attorney-client communications were in furtherance of an intended or present illegality" (Pet. App. 2a). The en banc court also ordered withdrawn the four paragraphs in the panel opinion that had noted and discussed the criticisms of *Shewfelt* (see Pet. App. 21a-22a). *Id.* at 2a.

Three judges dissented from the en banc court's order, arguing that rehearing en banc had not been improvidently granted and that the en banc court should overrule *Shewfelt* (Pet. App. 2a-9a). The dissenters criticized the majority for "perpetuat[ing] a maverick version of the attorney-client privilege" that "clashes with that of a majority of other circuits" (*id.* at 3a), citing cases from six courts of appeals (*id.* at 4a). The dissenters then discussed the merits of the independent evidence rule (*id.* at 4a-8a) and concluded that they "would overrule *Shewfelt*, eliminate the independent evidence requirement, and allow in camera inspection of suspect communications" (*id.* at 8a).[6]

SUMMARY OF ARGUMENT

I.

A. Congress has conferred upon the IRS the broad authority to issue a summons requesting the production of any documents that may be relevant to a tax investigation (I.R.C. § 7602). In the event the summoned party does not comply with the summons, the IRS may apply to a district court for enforcement, and Congress has conferred upon

[6] Judge Norris later filed an opinion concurring in the result in which he criticized the majority for failing to make clear whether its order was intended to be a disposition on the merits (Br. in Opp. App. 1a-2a).

those courts jurisdiction "to compel such attendance, testimony, or production of books, papers, records, or other data" requested by an IRS summons (I.R.C. §§ 7402(b), 7604(a)). Thus, the scope of the district court summons enforcement jurisdiction established by Congress is to determine whether the IRS is entitled to the production of the information, *i.e.*, whether the particular summons is a valid exercise of the IRS's summons authority. The content of the court's inquiry has been well established by this Court in *United States* v. *Powell*, 379 U.S. 48, 57-59 (1964), and subsequent cases. Primarily, the court must determine if the summons was issued in good faith and for a legitimate purpose authorized by Congress. If these and the other *Powell* criteria are satisfied, the court should enforce the summons; if not,—for example, if the IRS has sought to abuse the court's process by issuing the summons for an improper purpose such as to harass the taxpayer (see 379 U.S. at 58)—the court should not enforce the summons.

The role created for district courts by Congress in the summons enforcement process does not entail continuing supervision over the summoned material once it has been determined that the summons is valid and the material is supplied to the IRS. The courts below thus seriously deviated from the statutory framework in creating "a mechanism whereby the district court could monitor the IRS' use of the summoned documents" (Pet. App. 19a). The district court here unequivocally rejected respondents' challenge to the validity of the summons, concluding that the *Powell* criteria were satisfied and therefore that the IRS was entitled to the summoned documents. At that point, the materials should have been furnished to the IRS and subjected to the same rules—including the rules governing disclosure—that govern other taxpayer information in the hands of the IRS. The authority conferred upon the

district court by Congress had then been fully exercised. A district court has no authority to maintain jurisdiction to supervise and control the IRS's use or disclosure of the documents that have been produced in compliance with a summons. The statute plainly confers no such authority, this Court has never suggested its existence, and it surely should not be implied in light of this Court's repeated admonition that "restrictions upon the IRS summons power should be avoided absent unambiguous directions from Congress." *Tiffany Fine Arts, Inc.* v. *United States*, 469 U.S. 310, 318 (1985) (quoting *United States* v. *Arthur Young & Co.*, 465 U.S. 805, 816 (1984)).

B. The decision below undermines fundamental congressional policies embodied in the Internal Revenue Code. It is well established that summons enforcement proceedings are designed to be "summary" in nature because delay can seriously interfere with the effectiveness of IRS investigations. See *Donaldson* v. *United States*, 400 U.S. 517, 529 (1971). A procedure under which the court enforcing a summons retains jurisdiction to monitor the IRS's use of the documents would introduce unjustified delays into the process. First, it would invite litigation in the summons enforcement proceeding itself over the extent to which restrictions should be placed on the use of the summoned material, with the summoned party arguing that some special circumstances in its case require special restrictions on the IRS's use of the documents. Second, to the extent that restrictions are imposed that require monitoring by the district court, they would provide an opportunity for the summoned party to subject the IRS's investigation to repeated scrutiny in proceedings that would inevitably introduce substantial delays into the investigative process. Here, the court of appeals has held that the IRS may not make disclosures to government agencies, even if necessary to its investigation, unless it obtains prior

court approval, which may require a complex inquiry into whether the disclosure is authorized by Section 6103 of the Code. Since it would undermine the crucial goal of expedition that underlies the summons provisions, a power to supervise IRS investigations manifestly should not be implied from the congressional grant of jurisdiction to enforce summonses.

Moreover, the comprehensive framework established by Congress to enforce the prohibitions on disclosure contained in Section 6103 strongly suggests that Congress did not desire that summons enforcement proceedings be used to provide a pre-disclosure forum for considering Section 6103 issues. The Code generally provides only for post-disclosure remedies for Section 6103 violations – in the form of civil damage suits and criminal penalties – which are designed as deterrents. The fact that Congress has explicitly provided for pre-disclosure judicial involvement in certain specified situations – requiring court orders before certain disclosures are made under Section 6103(i) and making injunctive relief available to prevent disclosures of written determinations under Section 6110 – reinforces the conclusion that an additional pre-disclosure remedy should not be implied for documents produced in compliance with a summons. Moreover, the supervisory role approved by the court below, which essentially enjoins the IRS from making certain use of the summoned material, is sharply at odds with the thrust of the Tax Anti-Injunction Act, 26 U.S.C. 7421(a). In sum, the entire statutory scheme indicates that the questions of summons enforcement and improper disclosure are distinct. Once the district court determines that the summons should be enforced, its role is at an end; the documents should be produced, and they then become subject to the same rules and restrictions on disclosure that apply to any other material in the possession of the IRS.

II.

It is well established that the purpose of the attorney-client privilege is "to encourage full and frank communication between attorneys and their clients and thereby promote broader public interests in the observance of law and administration of justice" (*Upjohn Co.* v. *United States*, 449 U.S. 383, 389 (1981)) and that, since the privilege "has the effect of withholding relevant information from the factfinder, it applies only where necessary to achieve its purpose" (*Fisher* v. *United States*, 425 U.S. 391, 403 (1975)). Under these principles, it is similarly well established that communications with an attorney in connection with a contemplated or ongoing fraud are not privileged. There is no justification for the court of appeals' holding that such communications nonetheless should be protected from disclosure on grounds of attorney-client privilege unless "independent evidence" demonstrates a prima facie case of crime or fraud—even where the contents of the documents indisputably reveal that they fall within the crime-fraud exception.

The independent evidence rule adopted by the Ninth Circuit unnecessarily withholds probative evidence from the factfinder since the protection of attorney-client communications that plan a crime or fraud does not advance the purposes of the privilege. Moreover, the rule is contrary to the common and accepted practice for adjudicating claims of privilege—including attorney-client privilege—namely, in camera examination of the documents in question themselves. See, *e.g.*, *Kerr* v. *United States Dist. Court*, 426 U.S. 394, 405-406 (1976). There is simply no reason why invocation of the crime-fraud exception should be subject to an "independent evidence" procedural hurdle that is not applied in connection with other privilege issues. Indeed, this Court has rejected the use of an analogous independent evidence rule in the hearsay area

where there is initially at least some question about the probative value of the communication at issue. See *Bourjaily* v. *United States*, No. 85-6725 (June 23, 1987). It follows, *a fortiori*, that no such rule should apply here where the contents of the document itself are likely to be the most probative evidence of whether it is subject to the crime-fraud exception.

ARGUMENT

This case arises out of a summons issued by the Commissioner of Internal Revenue, pursuant to Section 7602 of the Internal Revenue Code,[7] to obtain documents relevant to an ongoing tax investigation. When the summoned party refused to comply with the summons, the United States filed this action in district court, pursuant to Section 7604 of the Code, to compel him to produce the documents. The district court found that the summons had been issued in good faith in furtherance of a legitimate tax investigation. The court, however, did not simply order the summoned party to produce those documents that the court agreed were relevant to the investigation. Instead, it imposed a condition on enforcement of the summons—namely, that the IRS could not disseminate the summoned information to any other government agency without prior approval of the court.

This order restraining disclosure was erroneous, and its affirmance by the court of appeals should be overturned. If a district court concludes that an IRS summons has been issued in good faith, the court is obliged to compel the summoned party to produce the relevant records. The court is not free to establish for itself a continuing role as a monitor of the IRS's use of those documents. The imposi-

[7] Unless otherwise noted, all statutory references are to the Internal Revenue Code of 1954 (26 U.S.C.), as amended (the Code or I.R.C.).

tion of restrictions on IRS use of the documents—in effect, an injunction against future actions that might be taken by the government—exceeds the proper scope of the court's inquiry in a summons enforcement action. Moreover, by requiring prior judicial approval for specified uses of summoned documents, the court's holding would undermine the goal of expeditious investigations and thereby retard the efficient enforcement of the tax laws.

The district court also refused to order production of certain relevant documents, the MCCS tapes, on the ground that they are protected by the attorney-client privilege, holding that the government had not made a prima facie case that the crime-fraud exception applies here to defeat the privilege claim, *i.e.*, the government had not adequately shown that the allegedly privileged conversations were devoted to planning future crimes or fraud. The court of appeals held that the contents of the tapes could not be considered in determining the applicability of the crime-fraud exception and therefore that, even if an in camera inspection of the tapes would clearly reveal that the conversations were devoted to planning a crime, the privilege could still be invoked successfully in the absence of "independent evidence" demonstrating the planning of crime or fraud. This independent evidence rule, which has been rejected by every other court of appeals that has considered the issue, would seriously vitiate the practical utility of the crime-fraud exception by permitting the attorney-client privilege to be invoked to shield probative evidence of crimes from investigators in many cases in which the privilege was not designed to operate. The rule adopted by the court of appeals is legally erroneous, and it should be rejected by this Court.

I. THE DISTRICT COURT ERRED IN RESTRICTING THE DISCLOSURE OF THE SUMMONED INFORMATION AS A CONDITION OF ENFORCING THE SUMMONS

A. The Role Of The District Court In A Summons Enforcement Action Is Limited To Determining Whether Or Not The Summons Should Be Enforced And Does Not Extend To Monitoring The IRS's Use Of The Summoned Materials

1. The Secretary of the Treasury is charged with the duty to enforce the revenue laws and, to that end, the Commissioner of Internal Revenue, as the Secretary's delegate, is charged with the duty "to make inquiries, determinations, and assessments of all taxes" imposed by the Internal Revenue Code (I.R.C. § 6201(a)). The summons power is the investigative tool provided by Congress to enable the Commissioner to make accurate determinations of tax liability. Section 7602 of the Code authorizes the Commissioner "[t]o examine any books, papers, records, or other data which may be relevant" to a tax investigation and to summon any person to appear and produce such documents and to give relevant testimony. As is the case with other administrative agencies that have subpoena power, however, the IRS does not have the power to compel obedience to its orders by means of contempt or other sanctions. See *Reisman* v. *Caplin*, 375 U.S. 440, 445-446 (1964); compare *ICC* v. *Brimson*, 154 U.S. 447, 485 (1894). Thus, if the summoned party refuses to produce the requested documents, the IRS must go to court in order to compel compliance with the summons. Sections 7402(b) and 7604(a) of the Code confer upon the district courts jurisdiction "to compel such attendance, testimony, or production of books, papers, records, or other data" requested by an IRS summons. See also Section 7609(h)(1) of the Code (conferring district court jurisdiction over challenges by taxpayers to summonses issued to certain third-party recordkeepers (defined in I.R.C. § 7609(a)(3)).

The purpose of the summons enforcement proceeding is to determine whether the government is entitled to production of the requested information, *i.e.*, whether the particular summons is a valid exercise of the IRS's summons authority. Accordingly, the summons may be challenged in the enforcement proceeding on "any appropriate ground," such as the contention that the material is being sought for an improper purpose not authorized by statute or that the summoned material is protected by the attorney-client privilege. See *Reisman* v. *Caplin*, 375 U.S. at 449. If the challenges are rejected by the district court, however, the taxpayer is required to comply with the summons, and the district court enters an enforcement order that compels obedience to the terms of the summons.

The proper limits of the district court's inquiry in a summons enforcement proceeding were delineated in the seminal case of *United States* v. *Powell*, 379 U.S. 48, 57-59 (1964). This Court held that it is not within the district court's authority to inquire into whether the Commissioner had probable cause to issue the summons. Rather, in order to obtain enforcement, the Commissioner is required to "show that the investigation will be conducted pursuant to a legitimate purpose, that the inquiry may be relevant to the purpose, that the information sought is not already within the Commissioner's possession, and that the administrative steps required by the Code have been followed" (*id.* at 57-58).[9] The Court added that this does

[9] Thus, as the Court pointed out in *Powell* (379 U.S. at 57), the scope of review in a summons enforcement proceeding is akin to the limited judicial role in reviewing subpoenas issued by other administrative agencies. The investigative power of an agency generally has been validly exercised if the "inquiry is one the demanding agency is authorized by law to make and the materials specified are relevant," so long as the subpoena is not unduly burdensome or indefinite. *Oklahoma Press Publishing Co.* v. *Walling*, 327 U.S. 186, 208 (1946). See also *Donovan* v. *Lone Steer, Inc.*, 464 U.S. 408, 415 (1984); *United States* v. *Morton Salt Co.*, 338 U.S. 632, 642-643 (1950).

not mean that the district court cannot make any inquiry at all into the underlying reasons for the summons, stating that "a court may not permit its process to be abused" (*id.* at 58 (footnote omitted)). The Court explained that "[s]uch an abuse would take place if the summons had been issued for an improper purpose, such as to harass the taxpayer or to put pressure on him to settle a collateral dispute, or for any other purpose reflecting on the good faith of the particular investigation" (*ibid.*). The Court specified that the burden of showing such an abuse is on the party challenging enforcement of the summons (*ibid.*). Under the framework established by this Court in *Powell*, therefore, a summons is to be enforced if the court concludes that it was issued in "good faith," *i.e.*, in furtherance of a legitimate purpose for which the use of the summons authority has been authorized by Congress. See also *United States* v. *Bisceglia*, 420 U.S. 141, 145-146 (1975); *Donaldson* v. *United States*, 400 U.S. 517, 526-527 (1971); see generally *United States* v. *Kis*, 658 F.2d 526, 535-536 (7th Cir. 1981), cert. denied, 455 U.S. 1018 (1982); *United States* v. *Garden State Nat'l Bank*, 607 F.2d 61, 70-71 (3d Cir. 1979).

The district court's role in a summons enforcement proceeding thus does not entail continuing supervision over the summoned material once it has been supplied to the IRS. The court simply determines whether the taxpayer's objections to the summons are valid. In the words of the statute, the court must exercise its "jurisdiction * * * to compel [the] attendance, testimony, or production of books, papers, records, or other data" requested by the summons (I.R.C. §§ 7402(b), 7604(a)). If the taxpayer's objections are valid, the Commissioner is not entitled to the requested materials and the summons is not enforced; if the taxpayer's objections are not valid, the Commissioner is entitled to the requested materials and the court's duty is

to order compliance with the summons. At that point, the statutory jurisdiction conferred upon the district court has been fully exercised, and the summons enforcement proceeding is at an end; the district court from which the enforcement order was sought has no further role to play in the summons process.

The courts below have deviated from this well-established framework for summons enforcement proceedings by creating, in the words of the court of appeals, "a mechanism whereby the district court could monitor the IRS' use of the summoned documents" (Pet. App. 19a). The district court, while ordering respondents to produce certain materials requested in the summons, also ordered the Commissioner not to release those materials to another government agency without obtaining prior approval of the court. That order exceeded its authority.[9]

[9] As noted *infra* (at 32), the proffered justification for this condition was to allay respondents' generalized fear that the summoned information might be disclosed to other government agencies involved in other litigation with the Church of Scientology. There is, of course, no absolute bar to the IRS's disclosing summoned material to other government agencies. Section 6103 of the Code specifically authorizes IRS disclosures to other agencies under specified conditions (see page, 33, *infra*), and it is "perfectly proper" for the IRS to make such disclosures of summoned material if it complies with Section 6103. *United States* v. *Stuckey*, 646 F.2d 1369, 1377 (9th Cir. 1981) (Merrill, J., concurring), cert. denied, 455 U.S. 942 (1982); see also *United States* v. *Scholbe*, 664 F.2d 1163 (10th Cir. 1981); *United States* v. *Chemical Bank*, 593 F.2d 451, 456-457 (2d Cir. 1979). The district court recognized this fact, and it made clear that it would authorize disclosures that the government could show were in compliance with the terms of Section 6103 (see J.A. 66, 68). Thus, it is clear that the court's order was not simply a traditional type of order enforcing the summons in part; rather, it created for the district court a continuing supervisory role over the IRS's use of the documents – one that would require the court to make determinations about the meaning of Section 6103 in the midst of the IRS's investigation. Accordingly, the

Until the imposition of this condition on the IRS's use of the summoned material, the enforcement proceeding here followed the scheme contemplated by Congress. Respondent Zolin was well within his rights in declining to comply with the subpoena in the first instance and requiring the government to petition for enforcement. Respondents Hubbard and Church of Scientology, who were permitted to intervene in the enforcement proceeding, had the right to challenge the IRS's good faith – on the basis of the assertion that the materials were not being sought in aid of a legitimate tax investigation, but rather were being sought to aid other government agencies in other matters that would not constitute a legitimate purpose for the issuance of a summons.[10] But the district court rejected respondents' assertions in no uncertain terms, stating that the "Church has failed to raise any doubt of the good faith of the Internal Revenue Service in pursuing this summons en-

cases relied upon by the court of appeals (see Pet. App. 19a; *United States* v. *Author Services, Inc.*, 804 F.2d 1520, 1525 (9th Cir. 1986)), which hold only that a summons may be partially enforced or narrowed and that the court may specify the time and place for production in order to ensure that compliance is not unduly burdensome, lend no support to the decision in this case.

[10] Nor was it inappropriate for respondents to contend that there had been prior unlawful disclosures by the IRS. The existence of a prior unlawful disclosure, which in any event was not demonstrated here, would not in itself require that enforcement be denied (see, *e.g.*, *United States* v. *Balanced Fin. Mgmt., Inc.*, 769 F.2d 1440, 1448 (10th Cir. 1985)), but it could conceivably be probative of the IRS's good faith or legitimate purpose in issuing the summons. Similarly, the courts have held that the alleged failure of the IRS to comply with the provisions of the Privacy Act, 5 U.S.C. 552a, is not in itself a ground for denying enforcement of a summons. See *United States* v. *McAnlis*, 721 F.2d 334, 337 (11th Cir. 1983), cert. denied, 467 U.S. 1227 (1984); *United States* v. *Berney*, 713 F.2d 568, 572-573 (10th Cir. 1983).

forcement proceeding (Pet. App. 27a).[11] The district court thus determined that the summons was valid, and that respondents had no justification for failing to supply the IRS with the requested materials.

At that point, the enforcement proceeding should have ended; the court's decision instead to maintain supervisory authority over the summoned material departed from the statutory scheme. The summons power is designed to give the IRS access to material necessary to conduct its legitimate tax investigations. When the summons is held to be valid and is enforced, there is no reason why the material thereby obtained should be subject to rules any different from those applicable to other taxpayer information in the possession of the IRS. If a taxpayer produced material to the IRS in prompt compliance with a summons (without a court order), it is clear that the use of that material would not be subject to supervision by a court; correspondingly, after the district court has determined that a summons should be enforced – *i.e.*, that the summons was valid and, in retrospect, should have been obeyed by the taxpayer – the court has no continuing reason or authority to supervise the IRS's use of the materials produced in response to the summons.[12]

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[11] At the hearing the court elaborated on this finding (J.A. 45-46):

> There's not an iota of evidence that this summons is being prosecuted for any reason other than to gather information for the on-going investigation. No indication it's being used to harass anybody. No indication it's being used out of personal spite. No indication that it's being used for a collateral purpose.

[12] The court of appeals justified a continuing supervisory role for the district court by invoking this Court's statement that " 'a court may not permit its process to be abused' " in a summons enforcement proceeding (Pet. App. 19a (quoting *United States* v. *Powell*, 379 U.S. at 58)). But this Court was quite explicit in *Powell* in describing what sorts of actions would be viewed as abuse of the summons enforcement process – namely, "if the summons had been issued for an improper purpose, such as to harass the taxpayer or to put pressure on him to settle a collateral dispute, or for any other purpose reflecting on the good faith of the particular investigation" (379 U.S. at 58). Thus, the "abuse of process" inquiry in a summons enforcement action is simply part of the *Powell* "good faith" inquiry. It examines the facts as they exist at the time of the enforcement proceeding in order to assess the purposes for which the summons was issued; the inquiry is not directed to the use that the IRS may ultimately make of the summoned information at some future date, which would require continued supervision of the IRS investigation.

2. This Court's decisions in the summons enforcement area reflect the understanding that the district court's role is limited to enforcing or denying enforcement (in whole or in part) of a summons, but does not extend to conditional enforcement with an attendant continuing supervisory role for the district court. The Court has emphasized that the IRS's summons power is a broad one, which reflects "a congressional policy choice *in favor of disclosure* of all information relevant to a legitimate IRS inquiry" (*United States* v. *Arthur Young & Co.*, 465 U.S. 805, 816 (1984) (emphasis in original)). Thus, this Court has noted on several occasions that "restrictions upon the IRS summons power should be avoided absent unambiguous directions from Congress." *Tiffany Fine Arts, Inc.* v. *United States*, 469 U.S. 310, 318 (1985); *United States* v. *Arthur Young & Co.*, 465 U.S. at 816; *United States* v. *Bisceglia*, 420 U.S. at 150; see also *United States* v. *Euge*, 444 U.S. 707, 711 (1980). The continuing supervision authorized by the court of appeals in this case is manifestly a restriction on the IRS's use of the summoned material. That restriction has no source in the statutes conferring jurisdiction on the district court, which contemplate only that the court will enter (or decline to enter) enforcement orders, and such a potentially open-ended restriction on

the IRS's use of summoned material should not lightly be implied.

This Court's recognition of the district court's limited role is well illustrated by *United States* v. *LaSalle Nat'l Bank*, 437 U.S. 298 (1978). In that case, the Court was faced with the question whether to enforce summonses where the district court had concluded that the IRS special agent who issued the summonses "was conducting his investigation solely for the purpose of unearthing evidence of criminal conduct" (*id.* at 299 (citation omitted)). Stating that the summons power is not to be allowed to "permit the IRS to become an information-gathering agency for other departments" (*id.* at 317), the Court focused its inquiry on determining the stage at which an IRS investigation should be deemed to have advanced to the point where enforcement of a summons would create an unacceptably high risk that the summons would operate as a means of criminal discovery that would "substantial[ly]" "infringe[ ]" upon the role of the grand jury (*id.* at 312). The Court concluded that when the IRS has referred a case to the United States Department of Justice for criminal prosecution or when the IRS, as an institution, has abandoned the civil tax investigation, the risk that a summons would substantially infringe upon the role of the grand jury was sufficiently great that, as a "prophylactic restraint" (*id.* at 312, 313 & n.15), the summons should not be enforced (*id.* at 311-318).[13]

[13] Congress subsequently resolved by statute the issue that the Court had considered in *LaSalle Nat'l Bank*. In Section 333(a) of the Tax Equity and Fiscal Responsibility Act of 1982 (TEFRA), Pub. L. No. 97-248, 96 Stat. 622, Congress amended Section 7602 of the Code to address that question. Section 7602(c) of the Code codifies part of the majority opinion in *LaSalle Nat'l Bank*, providing that a summons may not be issued when there is in effect a referral to the Justice Department for criminal prosecution. Congress, however, overruled the other part of the majority opinion, relating to whether the IRS, as an institution, has abandoned the pursuit of a civil tax investigation. Such an inquiry is no longer relevant to the summons enforcement question. Instead, Section 7602(b) specifies that an inquiry into the possibility that a criminal offense has been committed is a legitimate purpose for the issuance of a summons.

Significantly, it is apparent that the Court in *LaSalle Nat'l Bank* did not regard the approach of the court of appeals here – namely, conditional enforcement of the summons with continuing supervision by the court of the use of the materials – as a viable option. The Court did not find that enforcement of a summons after a Justice Department referral had been made *necessarily* would infringe on the role of the grand jury; it found only that there was a "substantial" "likelihood" that it would (see 437 U.S. at 312). Because the role of the summons enforcement court is simply to enforce the summons or to deny enforcement, the Court concluded that this likelihood required a "prophylactic" rule against enforcement of the summons; the Court did not consider an alternative approach under which the summons could be conditionally enforced with continued supervision of the IRS investigation to determine whether in fact the IRS's use or disclosure of the materials would infringe upon the role of the grand jury. Conversely, the Court also recognized that, even before referral, at the time of the recommendation of the special agent, there exists "the potential for expanding the criminal discovery rights of the Justice Department or for usurping the role of the grand jury" (437 U.S. at 313 n.15). Again, however, the Court did not consider accommodating those possibilities by conditional enforcement and continued supervision of the summons. Instead, the Court concluded that the possibilities were sufficiently "remote" that the prophylactic restraint of denying enforcement of the summons was not justified. Thus, this

Court implicitly recognized that the role of the district court in a summons enforcement proceeding is limited to enforcing or denying enforcement, based on the circumstances surrounding the issuance of the summons; the court is not empowered to retain jurisdiction to wait and see how the IRS uses the summoned materials.

Other decisions of this Court confirm that the district court's job is to focus its inquiry on whether the *Powell* good faith criteria have been satisfied and thereby make a final determination whether or not the summons should be enforced, not to enforce the summons conditionally pending further developments. In *Tiffany Fine Arts, Inc.* v. *United States, supra,* the Court held that a "dual purpose summons," *i.e.*, one that could assist in IRS investigations of both the summoned party and unnamed third parties, is not subject to the special requirements established by Congress for third-party "John Doe" summonses (I.R.C. § 7609(f)). The Court concluded that the traditional requirements for enforcement were satisfied by the IRS's showing that the summoned materials were relevant to a tax investigation of the summoned party; Congress had not specified that there should be any additional restrictions on enforcement in that situation, and therefore the Court did not impose any. See 469 U.S. at 318-322. And the Court did not suggest that the ultimate determination whether the IRS would have to meet the Section 7609(f) criteria should have been postponed while the district court monitored the use of the summoned material (to determine whether it in fact turned out to be relevant to an investigation of the summoned party or whether it was used by the IRS only to investigate unnamed third parties).

Similarly, when taxpayers have argued that the IRS has made an insufficient showing that the summoned materials may be relevant to a legitimate investigation, the Court has never suggested that the district court can maintain

supervision over the investigation to make a more accurate determination of the correctness of the taxpayer's contention. Rather, a final determination regarding enforcement must be made on the basis of the circumstances as they exist at the time of the summons enforcement proceeding. Thus, in *Powell* itself, where the taxpayer argued that the summons should not be enforced because the statute of limitations had run except for fraud, and in *United States* v. *Bisceglia, supra,* where it was argued that a particular bank transaction did not give the IRS sufficient reason to investigate any particular taxpayer, the Court held that the IRS had made a sufficient showing of legitimate purpose to justify enforcement, and that was the end of the matter. In neither instance did the Court suggest creating a continuing role for the district court to assess, for example, whether any evidence of fraud turned up in the investigation in *Powell.* In short, the district court's role in a summons enforcement proceeding is "to see that a legitimate investigation [is] being conducted and that the summons [is] no broader than necessary to achieve its purpose" (*United States* v. *Bisceglia,* 420 U.S. at 151). Once that inquiry is complete, the court must decide to enforce or to deny enforcement of the summons, after which it retains no authority to monitor or control the IRS's access to or use of the documents that it has obtained.

The established practice in summons enforcement proceedings, as reflected in decisions in the courts of appeals, similarly demonstrates that, after the enforcement decision has been made, the district courts do not retain continuing authority over documents produced in compliance with a summons. For example, *United States* v. *Chemical Bank,* 593 F.2d 451 (2d Cir. 1979), presented a situation closely analogous to the instant case. The summons in that case was issued by a revenue agent in connection with a Strike Force investigation; the Strike Force was a joint

effort by several government agencies to investigate organized crime, and it was coordinated by the Criminal Division of the Justice Department. Accordingly, the taxpayer argued that the summons should not be enforced because it served the purpose of gathering information for other government agencies for purposes of a criminal investigation. The court of appeals acknowledged that the IRS representative's membership in the Strike Force "could, in practice, lead to complications" (*id.* at 458) with respect to dissemination of summoned information. But the court held that that possibility did not counsel against enforcement of the summons, which was required because it was issued in good faith in furtherance of a civil tax investigation. And the court did not suggest that the summons should be enforced conditionally, with the district court retaining jurisdiction to monitor the IRS's use and dissemination of the information. Instead, the court simply held that the summons should be enforced, and that if any future problems arose with respect to dissemination in alleged violation of law, they could be dealt with at that time – in a different proceeding. *Id.* at 455-458. See also *United States* v. *Balanced Fin. Mgmt., Inc.*, 769 F.2d 1440 (10th Cir. 1985) (unconditionally enforcing summons despite taxpayer allegations that IRS had previously made unauthorized disclosures of that taxpayer's confidential return information).[14]

[14] The principle that summons enforcement proceedings are concerned solely with the question whether the summons should be enforced is also reflected in the recognition by the courts of appeals, with one exception, that compliance with a summons moots an appeal from the district court's order enforcing the summons. Once the documents have been produced, although there may still be a dispute regarding tax liability, "the controversy surrounding the enforceability of the summons no longer exist[s]," and an appeal from the enforcement order is moot. *United States* v. *First Family Mortgage Corp.*, 739 F.2d 1275, 1277 (7th Cir. 1984). See also *United States* v. *Kis*, 658 F.2d at 532-533 and cases collected there at n. 10; but see *Gluck* v. *United States*, 771 F.2d 750, 754 (3d Cir. 1985) (holding appeal not mooted by compliance with summons because court could prevent IRS from using summoned material).

B. Permitting The District Court To Retain Jurisdiction To Monitor The IRS's Use Of Summoned Material Would Conflict With Important Policies Relating To Summonses And With Other Provisions Of The Code

1. Supervision by the district court of the IRS's use of summoned material, as approved by the court below, not only would exceed the well-recognized limits on the scope of a summons enforcement proceeding, it also would undermine fundamental congressional policies embodied both in the summons provisions and in other sections of the Code. It is well established that summons enforcement proceedings are designed to be "summary" in nature. *Donaldson* v. *United States*, 400 U.S. at 529; see also, *e.g.*, *United States* v. *Rylander*, 460 U.S. 752, 756 (1983); *United States* v. *Kis*, 658 F.2d at 535-536; *United States* v. *Davis*, 636 F.2d 1028, 1038 (5th Cir.), cert. denied, 454 U.S. 862 (1981); M. Saltzman, *IRS Practice and Procedure* ¶ 13.04, at 13-25 to 13-27 (1981). This concern for expedition is essential because delay can seriously interfere with the effective exercise of the IRS's investigative authority. Accordingly, this Court in *Donaldson* limited the right of taxpayers to intervene in summons enforcement proceedings, "apparently out of concern for the ability of a taxpayer to delay the investigative process by forcing protracted enforcement proceedings" (M. Saltzman, *supra*, at 13-25). And in rejecting an inquiry into the motivations of the agent issuing a summons, the Court in *LaSalle Nat'l Bank* voiced the concern that permitting that additional inquiry would cause "undesirable" delays in summons enforcement (437 U.S. at 316). Congressional enactments stimulated by the decisions in

Donaldson and *LaSalle* have also been responsive to the need for expedition in summons enforcement so as to avoid delaying IRS investigations. See 26 U.S.C. 7602(c), 7609(c); S. Rep. 97-494, 97th Cong., 2d Sess. 285 (1982) ("summons enforcement proceedings should be summary in nature"); H.R. Rep. 94-658, 94th Cong., 2d Sess. 309 (1976) ("most important that the disposition of any court actions involved be heard on as expeditious a schedule as possible").

The decision below, approving "a mechanism whereby the district court could monitor the IRS' use of the summoned documents" (Pet. App. 19a), is at odds with this clearly established statutory policy of expedition. First, the mere availability of such a remedy would tend to spark additional litigation in the summons enforcement proceeding itself. An entirely new inquiry, apart from the traditional good faith inquiry, would be injected into the proceedings as taxpayers could argue that some special circumstance in their case warrants the imposition of a particular restriction on the IRS's use of the summoned material. Opening such a new avenue of inquiry would inevitably cause undesirable delays in summons enforcement. See *United States* v. *LaSalle Nat'l Bank*, 437 U.S. at 316. Moreover, the availability of such a remedy could induce some taxpayers, who would otherwise have complied with clearly valid summonses, to force the IRS to petition the district court for enforcement, in the hope that they can persuade the court to include in its enforcement order some restriction on the IRS's use of the summoned documents.

Second, to the extent any restrictions are approved by the district court, the proceedings to determine whether IRS actions comply with those restrictions would provide an opportunity for the summoned party to subject the IRS's investigation to repeated scrutiny and harassment. Litigation over special agent summonses typically is a constant struggle between the government's attempts to obtain

information necessary to its investigations in a timely fashion and taxpayers' attempts to delay those investigations. Allowing taxpayers to use the forum of a summons enforcement proceeding to litigate disclosure questions in advance would lead to the courts' repeated involvement at each new step of the investigation as the taxpayer seeks to prohibit the IRS's use of the summoned material to assist it in obtaining further information. That additional litigation (including possible appeals) would have the potential to cause significant delays in the tax investigation, particularly where the court would be asked to resolve difficult questions of permissible disclosure under 26 U.S.C. 6103.[15] Thus, a rule permitting district courts to extend their jurisdiction in summons enforcement actions to retain control over the IRS's use or disclosure of the summoned material would have deleterious effects on the enforcement of the tax laws because it would " 'stultify' and unduly delay the investigation sought by the IRS" into violations of those laws (*United States* v. *Ernst & Whinney*, 750 F.2d 516, 520 (6th Cir. 1984) (quoting *Donaldson* v. *United States*, 400 U.S. at 531)).

Even the limited restriction placed by the district court in this case on the IRS's use of the summoned material—requiring prior court approval for disclosure to any other government agency—might significantly hamper an IRS investigation because there are many cases in which cooperation with another agency, which may require some disclosures by the IRS, is essential to obtaining further in-

[15] The provision under which material summoned by the IRS would most likely be disclosed in the course of a tax investigation would be 26 U.S.C. 6103(k)(6), which authorizes "[d]isclosure by Internal Revenue officers and employees for investigative purposes." That subsection contains no bright-line rules, and a proceeding to determine whether a particular proposed disclosure satisfies its general standards may well be a complex one.

formation that would advance the investigation. The principle endorsed by the court of appeals, moreover, goes well beyond the particular restriction on disclosure involved here. The court of appeals' approach would validate various other types of restrictions on the IRS's use of summoned material—restrictions that inevitably would severely curtail the IRS's ability to conduct expeditious investigations.

For example, in *United States* v. *Texas Heart Inst.*, 755 F.2d 469 (5th Cir. 1985), a case on which the Ninth Circuit heavily relied and which it has specifically approved (Pet. App. 19a; *United States* v. *Author Services, Inc.*, 804 F.2d 1520, 1525 (1986)), the supervisory authority conferred upon the district court in the enforcement proceeding was directly aimed at the IRS's investigative process. The taxpayer there had objected to IRS summonses on the ground, inter alia, that the IRS allegedly had previously disclosed confidential return information in the course of the investigation, in violation of 26 U.S.C. 6103, when it sent out letters requesting information from the taxpayer's patients and those letters stated that the taxpayer was under investigation by the Criminal Investigation Division of the IRS. The court of appeals held that this allegation did not suggest that the summonses should not be enforced because it did not demonstrate either an abuse of process or a lack of legitimate purpose for the summonses (755 F.2d at 479). But the court proceeded to hold that, if the district court on remand concluded that the prior mailings violated Section 6103, the court could condition enforcement of the summonses on an IRS agreement not to make such disclosures in the future (755 F.2d at 480-481).

As the Fifth Circuit subsequently made clear, this was a holding that "the district court is empowered to make section 6103 determinations in an enforcement hearing" (*United States* v. *Barrett*, 804 F.2d 1376, 1379 (1986), rev'd

en banc, 837 F.2d 1341 (5th Cir. 1988), petition for cert. pending, No. 87-1705), which would open the door to protracted litigation quite unrelated to the limited subject matter of what is supposed to be a summary proceeding. In adhering to the rationale and holding of *Texas Heart* (in contrast to the Fifth Circuit itself, which has overruled it (see pages 38-40, *infra*)), the Ninth Circuit has sanctioned a continuing role for the district court that entails a power of prior restraint, during the progress of the investigation, over the use of materials obtained pursuant to a concededly valid summons. That power of prior restraint could be invoked to stop the investigation in its tracks; at a minimum, it would interpose a barrier in the midst of the investigative process that could cause substantial delays while complex issues under Section 6103 are litigated.[16]

[16] The serious harm that could befall an IRS investigation under the court of appeals' holding is also illustrated by a subsequent unpublished district court decision, *Vardax Consultants (Canada), Inc.* v. *United States*, No. C86-1206 (W.D. Wash. 1987), appeal pending, No. 87-3814 (9th Cir.). In that case, the IRS issued summonses in furtherance of an investigation being conducted under the auspices of the United States-Canada Simultaneous Criminal Investigation Program (SCIP)—under which each country conducts an investigation of the target to determine if its own revenue laws have been violated and the agents meet periodically to coordinate their investigations and to exchange information. The district court held that the summons should be enforced because it was in furtherance of a legitimate investigation of the target's United States tax liability. The court, however, conditioned that enforcement by prohibiting the IRS from sharing any of the summoned information with Canadian authorities—because of its concern that such a disclosure of information would violate the Ninth Circuit's holding regarding the enforcement of treaty summonses in *Stuart* v. *United States*, 813 F.2d 243 (1987), cert. granted, No. 87-1064 (May 2, 1988). The result is that the IRS's ability to conduct its investigation in cooperation with the Canadian authorities has been derailed for an indefinite and lengthy period (the appeal in *Vardax* is being held pending this Court's decision in *Stuart*), while the courts determine the legality of a possible future disclosure of material to which the IRS is concededly entitled.

2. There are no countervailing considerations that justify the court of appeals' departure from the statutory scheme of expeditious summons enforcement proceedings. The justification advanced by the courts below for imposing the restriction on the IRS's investigation was to allay the Church of Scientology's generalized fear that the summoned information might be disclosed to other government agencies involved in other litigation with the Church; more generally, it was to prevent disclosures that would violate the limitations of Section 6103 of the Code. See *United States* v. *Author Services, Inc.*, 804 F.2d at 1526 (involving the same tax investigation); Pet. App. 19a; J.A. 65-67. The courts thereby mistakenly transformed the summons enforcement proceeding into a forum for enforcing the Code's restrictions on disclosure—in a manner that Congress clearly did not contemplate or authorize.

Section 6103 has its own detailed enforcement scheme, which makes no provision for the sort of monitoring and prior restraint contemplated by the courts below. There is no reason to believe that Congress viewed the general enforcement scheme for Section 6103 as inadequate or in need of supplementation when the information in question has come into the hands of the IRS by way of compliance with a valid summons. To the contrary, the entire statutory scheme—the provisions establishing the IRS's summons power, those conferring summons enforcement jurisdiction on the district courts, the provisions restricting disclosures by the IRS of confidential information, and those designed to enforce those confidentiality rules—suggests that the questions of summons enforcement and improper disclosure are distinct. The summons enforcement proceeding is designed to resolve the IRS's entitlement to the documents; if the summons is a valid exercise of the IRS's authority, it should be enforced and the material produced. At that point, the summoned material becomes subject to the same rules and restrictions on disclosure that apply to any other material in the possession of the IRS, but the material no longer should be subject to the jurisdiction and supervision of the court enforcing the summons.

The provisions of the Internal Revenue Code governing the disclosure of confidential tax information are quite comprehensive. Section 6103(a) generally prohibits the IRS from disclosing tax returns or "return information," except in circumstances specifically permitted by the Code. Section 6103(b)(2) defines the term "return information" broadly, and it generally includes material received by the IRS in compliance with a summons, as "data * * * collected by the Secretary with respect to a return or with respect to the determination of the existence, or possible existence, of liability" under the Code. See generally *Church of Scientology* v. *IRS*, No. 86-472 (Nov. 10, 1987), slip op. 1-3. Section 6103 then sets forth in considerable detail the circumstances under which such disclosures are authorized to certain identified parties (§ 6103(c)-(o)). Among the disclosures that are permitted by the statute, under the circumstances specified therein, are disclosures: to persons having a material interest, such as the taxpayer's representative (§ 6103(e)); to congressional committees (§ 6103(f)); to certain federal officers and employees for purposes of tax administration and other specified purposes (§ 6103(h) and (i)); to a foreign government pursuant to a tax treaty (§ 6103(k)(4)); and to the extent necessary for investigative purposes (§ 6103(k)(6)).

The Code, moreover, provides severe sanctions for violation of the disclosure restrictions. Section 7213(a) of the Code imposes criminal sanctions upon federal employees and other persons who willfully disclose confidential information in violation of Section 6103. And Section 7431 of the Code establishes the remedy of a civil damage suit against the United States for "knowing[ ]"

or "negligen[t]" violations of Section 6103.[17] Section 7431 is designed both "to redress any injury sustained and to aid in the enforcement of the confidentiality rules." S. Rep. 94-938, 94th Cong., 2d Sess. 347 (1976).

Clearly, the enforcement scheme established by Congress to protect the confidentiality of tax return information does not generally entail judicial involvement before a disclosure is made; Congress provided for post-disclosure remedies that would act as a deterrent to unlawful disclosures, not for prior restraint. That approach is not universal, however; Congress specifically provided for additional, pre-disclosure safeguards in particular situations where it believed them to be necessary. Section 6103(i) provides that disclosures to other government agencies for certain specified purposes unrelated to tax administration may not be made without an ex parte court order.[18] Congress has also provided for a pre-disclosure remedy in connection with confidential requests for private letter rulings

[17] Section 7431(a)(1) provides that a damage suit may be brought against the United States if the disclosure is made by one of its officers or employees. If the disclosure is made by another person, Section 7431(a)(2) authorizes a damage suit directly against the person making the unlawful disclosure. Section 7431(c) authorizes a damage recovery of costs, actual damages, and punitive damages in the case of willful or grossly negligent disclosures; it also specifies a minimum damage award of $1,000 for each act of unauthorized disclosure.

[18] An ex parte application for a disclosure order from a district judge or magistrate is required before the IRS can disclose return information to another government agency for use in non-tax criminal investigations (§ 6103(i)(1)) or in locating fugitives from justice (§ 6103(i)(5)). And return information obtained under Section 6103(i)(1) cannot be disclosed in judicial proceedings in non-tax criminal cases or related civil forfeiture cases without prior approval by the court (§ 6103(i)(4)).

and other "written determinations." Section 6110 of the Code generally provides that written determinations and background file documents are to be open for public inspection, after they have been redacted to remove identifying and other confidential information. Section 6110(f)(1), however, requires the Secretary to give a taxpayer notice of his intent to disclose these documents, and Section 6110(f)(3) explicitly provides the taxpayer with a right to seek pre-disclosure injunctive relief in the Tax Court if he is dissatisfied with the deletions that have been made to preserve confidentiality.[19]

[19] The particular injunctive remedy established by Congress in Section 6110(f)(3) is highly probative of Congress's intent under Section 6103 because the two sections were enacted contemporaneously. In the Tax Reform Act of 1976, Pub. L. No. 94-455, 90 Stat. 1520, Congress undertook to overhaul the confidentiality provisions of the Internal Revenue Code because of its concern that the statutory protections for return information were inadequate and that the existing level of disclosure "breache[d] a reasonable expectation of privacy on the part of the American citizen" (S. Rep. 94-938, 94th Cong., 2d Sess. 317 (1976)). See *Church of Scientology* v. *IRS*, slip op. 6-7. Accordingly, Congress comprehensively revised Section 6103 to tighten the disclosure rules, and it also added the civil damage remedy now contained in Section 7431 "to redress any injury sustained and to aid in the enforcement of the confidentiality rules" (S. Rep. 94-938, *supra*, at 347). The provisions of Section 6110 governing the publication of "written determinations" were also enacted as part of the 1976 Act. Thus, the two provisions should be read in pari materia, and the express provision in Section 6110(f)(3) of a pre-disclosure injunctive remedy strongly suggests that an additional remedy should not arise by implication to prevent other possible disclosures in violation of Section 6103 – particularly a remedy which, unlike that in Section 6110(f)(3), would tend to interfere with the IRS's access to information in the first place.

Thus, it is apparent that Congress considered the issue of when a pre-disclosure remedy is appropriate to protect the taxpayer's interest in confidentiality, and it decided not to create such a remedy generally under Section 6103. Given this Court's repeated admonition that "restrictions upon the IRS summons power should be avoided absent unambiguous directions from Congress" (*Tiffany Fine Arts, Inc.* v. *United States*, 469 U.S. at 318; *United States* v. *Arthur Young & Co.*, 465 U.S. at 816), it is clear that a pre-disclosure remedy should not be implied for the special case of documents obtained pursuant to a summons.

Indeed, such a special limitation on disclosure of summoned documents would be particularly anomalous in light of the policies underlying Section 6103. Congress has recognized that taxpayers' willingness to provide private information to the IRS depends upon their trust that it will remain confidential, and it was concern over the erosion of that trust, and its effect upon the voluntary furnishing of information to the IRS, that in large part prompted the 1976 revisions to Section 6103. The Senate Report specifically noted that the breaches of privacy permitted under the pre-1976 statute could "seriously impair the effectiveness of our country's very successful voluntary assessment system which is the mainstay of the Federal tax system" (S. Rep. 94-938, *supra*, at 317) and that they could adversely affect "the continuation of compliance with our country's voluntary assessment system" (*id.* at 318). It would stand this congressional policy on its head to imply a special pre-disclosure remedy in the case of information obtained through enforcement of a summons—the one class of information that is not furnished voluntarily to the IRS but whose production is stubbornly resisted by the taxpayer—while such a remedy is not available to prevent disclosure of information that a taxpayer freely gives to

the IRS in accordance with our voluntary assessment system. In sum, the existence of the explicit pre-disclosure remedies contained in Sections 6103 and 6110 strongly counsels against implying additional judicial remedies, either ex parte or in an adversary injunctive action, to restrain the disclosure of return information obtained as a result of a summons enforcement action.[20]

The decision below is also sharply at odds with the thrust of Section 7421(a) of the Code, commonly known as the Tax Anti-Injunction Act. That statute generally withdraws jurisdiction from the courts to hear suits for the "purpose of restraining the assessment or collection of any tax," and the courts have broadly construed it as "equally applicable to activities leading up to, and culminating in, such assessment and collection" (*Lowrie* v. *United States*, 824 F.2d 827, 830 (10th Cir. 1987)), including investigative activity.[21] And, specifically, the Seventh Circuit, noting that the Act bars a taxpayer from "seeking to enjoin the

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[20] Indeed, even the Ninth Circuit has recognized in another context that the detailed enforcement scheme erected by Congress suggests that the courts should be "reluctan[t] to imply a judicial remedy for violations of § 6103 given Congress' explicit provision of a remedy" (*United States* v. *Michaelian*, 803 F.2d 1042, 1049 (1986)). Thus, the courts generally have declined to recognize implied judicial remedies for unlawful disclosure, such as suppression of evidence or dismissal of an indictment. See *id.* at 1048-1050; *Marvin* v. *United States*, 732 F.2d 669, 673 (8th Cir. 1984); *United States* v. *Barnes*, 604 F.2d 121, 146 (2d Cir. 1979), cert. denied, 446 U.S. 907 (1980).

[21] See, *e.g.*, *Zimmer* v. *Connett*, 640 F.2d 208, 210 (9th Cir. 1981) (Tax Anti-Injunction Act prohibits enjoining IRS inspection of taxpayers' books); *Black* v. *United States*, 534 F.2d 524, 527 (2d Cir. 1976); *Lewis* v. *Sandler*, 498 F.2d 395, 397 (4th Cir. 1974); *Koin* v. *Coyle*, 402 F.2d 468, 469 (7th Cir. 1968) (Act bars suit to enjoin IRS from using evidence to make tax assessments).

IRS from acquiring or using the information necessary for the IRS to determine a proper tax assessment," has rejected a taxpayer's attempt to enjoin the IRS's use of material produced in compliance with a summons enforcement order. *United States* v. *First Family Mortgage Corp.*, 739 F.2d 1275, 1278 (1984). The court stated that, "[a]bsent a clear indication allowing remedial powers for the court once the IRS obtains summoned documents" (*id.* at 1278-1279), the Tax Anti-Injunction Act does not allow a court "to stop the IRS from using those documents" (*id.* at 1278). A request by a taxpayer in a summons enforcement proceeding for a prohibition (pending application to the court for approval) on disclosures by the IRS that it deems necessary to its investigation, such as the restrictions approved by the court below and by the court in *Texas Heart* (see page 28, *supra*), is essentially a suit to enjoin the IRS in part from using summoned material in its possession to further its investigation, and it therefore runs squarely counter to the dictates of the Tax Anti-Injunction Act.

3. Essentially for these reasons, the Fifth Circuit recently reconsidered en banc the rule that it had propounded in *United States* v. *Texas Heart Inst.*, *supra*, and overruled it. *United States* v. *Barrett*, 837 F.2d 1341 (1988), petition for cert. pending, No. 87-1705. *Barrett* involved another summons that had been issued in the course of the same investigation that was the subject of *Texas Heart*, and the panel had approved the imposition of the same condition on enforcement—namely, that the district court could prohibit disclosures proposed by the IRS as necessary for its investigation, on the basis of the district court's judgment that such disclosures would not comport with Section 6103. The en banc court flatly held that "in a summons enforcement proceeding the only issue

that the district court can decide is whether to enforce the summons. The court cannot conditionally enforce that order." 837 F.2d at 1351. The en banc court pointed out that if a court imposed conditions on the enforcement of a summons, "it would then potentially have to become involved in the proceeding again at a later date to ensure compliance with the conditions it imposed," which would "burden the 'summary' nature of summons enforcement proceedings" (*id.* at 1349). The court also stated that such expansion of the scope of summons enforcement proceedings was "definitely" not the intent of Congress, explaining that Congress did not enact a statute to authorize conditional enforcement of summonses, but "instead enacted civil remedies that allow an individual to bring suit against the United States and provided for criminal prosecution of the disclosing parties"—remedies that "clearly are intended to deter unnecessary disclosures of confidential information" (*id.* at 1350). The en banc court summarized its conclusion as follows (*ibid.*):

> There is no statutory authority, nor congressional indication that existing statutes supply the authority, nor Supreme Court authority, to allow the district court to make any consideration except whether to enforce or not to enforce the summons. The district court does not have the power to conditionally enforce the summons. If good faith and a legitimate purpose are found to exist, the summons should be enforced. If they are not present, enforcement should be denied. There is no middle ground because to create that remedy would unduly hamper the investigative efforts of the IRS.

Thus, after due consideration, the Fifth Circuit, whose *Texas Heart* decision provided the basis for the decision below, has recognized its error and emphatically rejected

conditional enforcement of summonses.[22] This Court should reach the same conclusion.

II. THE CONTENTS OF THE DOCUMENT IN QUESTION MAY BE CONSIDERED IN DETERMINING THE APPLICABILITY OF THE "CRIME-FRAUD" EXCEPTION TO THE ATTORNEY-CLIENT PRIVILEGE

The attorney-client privilege is the oldest of the privileges for confidential communciations recognized by the common law (see 8 J. Wigmore, *Evidence* § 2290 (McNaughton rev. 1961)), and this Court has considered

[22] While the Fifth Circuit's decision in *Barrett* directly addresses the contention that a summons should be conditionally enforced to prevent unlawful disclosures, other court of appeals decisions also recognize that the possibility that summoned material will be disclosed in violation of Section 6103 is a matter to be dealt with by the remedies established by Congress for such violations, not by expanding the scope of summons enforcement proceedings beyond the traditional good faith/legitimate purpose inquiry. In *United States* v. *Chemical Bank, supra*, the court of appeals held that the summons should be enforced despite the court's recognition that the Strike Force's involvement in the investigation created a possibility that an unlawful disclosure would ultimately occur. The court ruled that this possibility was not a sufficient basis for declining to enforce the summons and that it was not the role of the district court to guarantee that such a disclosure would not take place in the future. The court explained that "the judiciary does not anticipate that the Government will act unlawfully. When it does, there is usually the time as well as the means to repair the damage." 593 F.2d at 455. The court further noted that, outside the framework of a summons enforcement action, Congress has provided sanctions for violations of the disclosure statutes (*id.* at 457-458). Similarly, in *United States* v. *Balanced Fin. Mgmt., Inc.*, 769 F.2d at 1447-1448, the court rejected the taxpayer's claim that allegedly unlawful prior disclosures were grounds for denying enforcement of a summons. The court stated that "less extreme remedies than denial of enforcement should be sufficient" to address the problem of unlawful disclosure, citing Sections 7213 and 7431 of the Code, the enforcement provisions enacted by Congress (769 F.2d at 1448).

its scope on several occasions. The purpose of the privilege is "to encourage full and frank communication between attorneys and their clients and thereby promote broader public interests in the observance of law and administration of justice" (*Upjohn Co.* v. *United States*, 449 U.S. 383, 389 (1981)). See also *Trammel* v. *United States*, 445 U.S. 40, 51 (1980); *Hunt* v. *Blackburn*, 128 U.S. 464, 470 (1888). The privilege, however, does not absolutely bar the disclosure of all communications between attorney and client. Since it "has the effect of withholding relevant information from the factfinder, it applies only where necessary to achieve its purpose" (*Fisher* v. *United States*, 425 U.S. 391, 403 (1976)), and several exceptions have been recognized to the general rule against disclosure of attorney-client communications.

One of the exceptions to the attorney-client privilege that has long been recognized is the "crime-fraud exception." See, *e.g.*, 8 J. Wigmore, *supra*, § 2298. When a client consults an attorney for advice in carrying on a contemplated or ongoing crime or fraud, the communication is not privileged. See *Clark* v. *United States*, 289 U.S. 1, 15-16 (1933); see generally 2 J. Weinstein and M. Berger, *Weinstein's Evidence* ¶ 503(d)(1)[01] (1988); S. Stone and R. Liebman, *Testimonial Privileges* § 1.65 (1983 & Supp. 1987). Such a communication is not designed to promote "the observance of law and administration of justice" (*Upjohn Co.* v. *United States*, 449 U.S. at 389), but to subvert it. Extending a privilege to this type of communication would deny to the courts what may be highly probative evidence, without advancing any desirable policy, and therefore such communications clearly do not meet the standards for invocation of the attorney-client privilege set forth in *Fisher* v. *United States, supra*.

Under these principles, it must be assumed at this stage of the litigation that the MCCS tapes at issue in this case

are outside the scope of the attorney-client privilege. The government submitted partial transcripts of the tapes that assertedly showed that the meetings recorded on the tapes were devoted in part to planning to defraud the IRS. The government also submitted the affidavit of an IRS official who had listened to the tapes in their entirety when they were in the possession of the government, and he stated that part of the discussion involved the planning of future crimes and fraudulent acts against the IRS. See pages 3-5 & note 2, *supra*. While respondents and the district court disputed the conclusions to be drawn from the government's submissions—maintaining that the partial transcripts did not demonstrate the planning of a fraud and that the affidavit should be rejected as untimely (see Pet. App. 25a-26a, 28a; pages 4-6 & notes 2-3, *supra*)—the court of appeals did not resolve that dispute. The court of appeals did not question the *strength* of the government's showing; its opinion assumed arguendo that the government's submissions concerning the contents of the tapes adequately demonstrated that the discussion involved the planning of future crimes or fraud. The court of appeals' rejection of the government's claim to the tapes rested entirely on the *type* of evidence used to prove the fraud; because the proof had come from the contents of the tapes themselves, rather than from "independent evidence," the court concluded that the crime-fraud exception could not be invoked (see Pet. App. 2a, 23a, citing *United States* v. *Shewfelt*, 455 F.2d 836, 840 (9th Cir.), cert. denied, 406 U.S. 944 (1972)).[23]

[23] The Ninth Circuit's rule is clearly an absolute bar to any consideration by the district court of the contents of the communication itself in determining whether the crime-fraud exception is applicable. That is why the court of appeals did not consider whether the district court was correct in finding that the partial transcripts that it examined were insufficient to demonstrate the applicability of the crime-fraud exception. The correctness of that absolute rule is the question presented in this case. This case does not present the question of the extent to which a district court can be *required* to make an in camera inspection of documents. Cf. Br. in Opp. 21-23. Nor is this Court presented with questions concerning the adequacy of the showing made by the government in this case by way of the partial transcripts or the later Xanthos affidavit (found by the district court to be untimely). Those issues will be open on remand in the event that this Court holds, as we urge, that the applicability of the crime-fraud exception can be shown by other than independent evidence.

Thus, the rule established by the Ninth Circuit—"that the government must make a prima facie showing, independent of the communications involved, that the attorney-client communications were in furtherance of an intended or present illegality" (Pet. App. 2a)—inevitably contemplates that in some cases probative evidence of a crime will be shielded from the factfinder even though it is readily apparent that the communication in question was in furtherance of a crime or fraud and thus should not fall within the protection of the attorney-client privilege.[24] This rule on its face is directly contrary to this Court's admonition in *Fisher* that, "since the privilege has the effect of withholding relevant information from the factfinder, it applies only where necessary to achieve its purpose" (425 U.S. at 403). Yet the Ninth Circuit has made no attempt to explain why such a procedural hurdle should be erected to the invocation of the crime-fraud exception—either in its

[24] This consequence of the Ninth Circuit's rule is clearly illustrated by *Shewfelt* itself. In that case, the court of appeals *began* its discussion of the crime-fraud issue with the observation that "it is clear that the thrust of these attorney-client conversations was to effectuate a plan of fraud" (455 F.2d at 840). The court did not, however, view this conclusion as dispositive of the privilege question. It proceeded to state the independent evidence rule and to engage in a detailed examination of the independent evidence that had been adduced before ruling that the claim of privilege should be rejected (*id.* at 840-841).

decision below (see Pet. App. 2a) or in its original decision in *Shewfelt*, 455 F.2d at 840. In fact, there is no sound justification for the "independent evidence" rule. The dissenters from denial of rehearing en banc correctly characterized the rule as "a maverick version of the attorney-client privilege" (Pet. App. 3a) that should be "eliminate[d]" (*id.* at 8a).

Clearly, the most accurate method of determining whether a document is privileged against disclosure is by examination of the document itself. For this reason, the courts routinely resolve disputes over the validity of privilege claims by examining the documents—preserving their confidentiality by conducting the examination in camera. This Court has stated, in the context of a claim of "governmental privilege," that "an *in camera* review of the documents is a relatively costless and eminently worthwhile method to insure that the balance between petitioners' claims of irrelevance and privilege and plaintiffs' asserted need for the documents is correctly struck" (*Kerr* v. *United States Dist. Court*, 426 U.S. 394, 405 (1976) (footnote omitted)). The Court further noted that "this Court has long held the view that *in camera* review is a highly appropriate and useful means of dealing with claims of governmental privilege" (*id.* at 405-406). See also *United States* v. *Nixon*, 418 U.S. 683, 706, 713-714 (1974). The reported cases reflect the broad acceptance of this approach as a matter of common practice, with both district courts and courts of appeals examining the contested documents in camera to resolve privilege disputes, including claims of attorney-client privilege made in opposition to the enforcement of IRS summonses. See, *e.g.*, *Hodges, Grant & Kaufmann* v. *United States*, 768 F.2d 719, 720 (5th Cir. 1985); *United States* v. *Lawless*, 709 F.2d 485, 486, 488 (7th Cir. 1983); *In re Grand Jury Witness (Salas)*, 695 F.2d 359, 362 (9th Cir. 1982) (grand

jury subpoena); *United States* v. *Osborn*, 561 F.2d 1334, 1337, 1339 (9th Cir. 1977).

There is no apparent reason why the question of the applicability of the crime-fraud exception should be singled out in this respect for treatment different from that accorded to any other privilege question, and, with the notable exception of the Ninth Circuit, the courts have recognized that in camera examination of the documents in question is an appropriate and, indeed, commendable method of resolving this issue. Thus, the Sixth Circuit noted in one crime-fraud case that "*in camera* review of the documents could have assisted the court in determining whether a *prima facie* violation had been made," and it therefore reversed the district court's refusal to apply the crime-fraud exception on the ground that "the district court erred in not reviewing the documents * * * *in camera* in order to determine whether they reflect communications or work product made in furtherance of a contemplated or ongoing [statutory] violation" (*In re Antitrust Grand Jury*, 805 F.2d 155, 168-169 (1986)). The one court that has been asked to follow the "maverick" *Shewfelt* precedent explicitly rejected it instead, noting that the cases relied upon in *Shewfelt* "do not support the independent evidence restriction" (*In re Berkley & Co.*, 629 F.2d 548, 553 n.9 (8th Cir. 1980)). See also *In re Sealed Case*, 676 F.2d 793, 815 (D.C. Cir. 1982) (footnote omitted) (opinion of Wright, J.) ("the subpoenaed material itself may provide *prima facie* evidence of a [crime or fraud]"). More commonly, the courts have simply utilized in camera examination of the disputed documents in order to resolve a crime-fraud issue without any discussion at all of the validity of that procedure. See, *e.g.*, *In re Grand Jury Proceedings (FMC Corp.)*, 604 F.2d 798, 800 (3d Cir. 1979); *Union Camp Corp.* v. *Lewis*, 385 F.2d 143, 144 (4th Cir. 1967);

Irving Trust Co. v. *Gomez,* 100 F.R.D. 273, 277 (S.D.N.Y. 1983).

It is clear, therefore, that the Ninth Circuit's independent evidence rule has been uniformly rejected. See generally 2 J. Weinstein and M. Berger, *supra,* ¶ 503(d)(1)[01], at 503-71; M. Larkin, *Federal Testimonial Privileges* § 2.07, at 2-88.1 (1986). The same conclusion was also embodied in the proposed Rule of Evidence addressed to the attorney-client privilege, Rule 5-03, that was transmitted by this Court to Congress. Proposed Rule 5-03(d) set forth several exceptions to the attorney-client privilege, including the crime-fraud exception in 5-03(d)(1). See 46 F.R.D. 161, 251 (1969). This rule, which was characterized by its drafters as "incorporat[ing] well established exceptions" (*id.* at 256), did not impose an independent evidence requirement. And the Advisory Committee's Note on the crime-fraud exception was quite explicit on this point, stating that "[n]o preliminary finding that sufficient evidence aside from the communication has been introduced to warrant a finding that the services were sought to enable the commission of a wrong is required" (*ibid.*).[25] Thus, both the decisions of other courts and the expert secondary sources on questions of privilege confirm the dissenters' characterization of the Ninth Circuit's independent evidence rule as a "maverick" (Pet. App. 3a) approach that is squarely at odds with prevailing law.[26]

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[25] Congress did not adopt any of the proposed rules governing evidentiary privileges. Instead, it determined that questions of privilege should continue to be governed by common law evidentiary rules, rather than by the Federal Rules of Evidence. See Fed. R. Evid. 501. As we have shown, the prevailing common law rules do not contain an independent evidence requirement for the invocation of the crime-fraud exception.

[26] Indeed, the *Shewfelt* rule is such a departure from prevailing principles that even one district court in the Ninth Circuit declined to follow it. See *United States* v. *King,* 536 F. Supp. 253, 261-262 (C.D. Cal. 1982).

As this Court's recent decision in *Bourjaily* v. *United States,* No. 85-6725 (June 23, 1987), makes clear, there is no policy justification for an independent evidence rule in this context. In *Bourjaily,* the Court held that a previously-recognized independent evidence requirement for invocation of the co-conspirator hearsay exception (Fed. R. Evid. 801(d)(2)(E)) is no longer good law in modern practice. The Court explained that the Federal Rules of Evidence had eliminated the prohibition on the use of hearsay evidence in making determinations of admissibility (see Fed. R. Evid. 104, 1101(d)(1)). In the absence of such a prohibition, which arguably would be an absolute bar to examination of the statements in question, the Court found no justification for an independent evidence rule. Rather, it concluded that the court should be entitled to consider all probative evidence in making its determination as to the admissibility of the evidence. See *Bourjaily,* slip op. 7-8; see also *United States* v. *Matlock,* 415 U.S. 164, 172-177 (1974).

It follows, *a fortiori,* from *Bourjaily* that an independent evidence rule should not be imposed as a procedural hurdle to invocation of the crime-fraud exception. In the co-conspirator hearsay context, the evidence whose admissibility is in question is "presumed [to be] unreliable" (slip op. 7 (emphasis omitted)) until a conspiracy is established. It was therefore arguable that such evidence is not probative and should not be considered by the court unless the existence of the conspiracy is proved by independent evidence. In the crime-fraud context, by contrast, there is no doubt as to the reliability of the evidence; indeed, in camera examination of the disputed communication is often the *most reliable* way of determining whether it

relates to a contemplated or ongoing crime or fraud. See *Kerr* v. *United States Dist. Court*, 426 U.S. at 405; *In re Antitrust Grand Jury*, 805 F.2d at 168. Moreover, the independent evidence rule at issue in *Bourjaily* had been fairly well established prior to the promulgation of the Federal Rules of Evidence and therefore it was arguable that the rule should not have been disturbed; here, by contrast, the Ninth Circuit's rule that invocation of the crime-fraud exception must rest upon independent evidence is plainly at odds with prevailing law. Despite the considerations arguing in favor of retention of the independent evidence requirement in the co-conspirator hearsay context, this Court rejected that rule in *Bourjaily* because it was inimical to the search for truth. The Court manifestly should reach the same result here where there are no countervailing considerations.

In sum, there is no justification for the independent evidence rule that is applied by the Ninth Circuit. Its adoption would result in the withholding of probative evidence from the factfinder on the grounds of attorney-client privilege in situations where it is readily apparent that the privilege is not applicable because in camera inspection of the communication in question would reveal beyond dispute that the communication relates to an ongoing or contemplated crime or fraud. No policy objective of the attorney-client privilege is advanced by such a rule, and there is accordingly no basis for accepting its deleterious effect on the search for truth.[27] When a district court

[27] The independent evidence requirement could have significant practical effects on the administration of justice. In many cases, the contents of the communication may be the only accessible evidence of whether it is related to crime or fraud. In such cases, the independent evidence rule would operate as a bar to the introduction of evidence even though the purposes of the attorney-client privilege manifestly are not served by its invocation. Moreover, in some cases the communication itself may be the only evidence of crime – for example, where an attorney is charged with obstruction of justice. In a case like that, the Ninth Circuit's rule would "simply serve to insulate dishonest attorneys from prosecution for obstruction of justice" (*United States* v. *King*, 536 F. Supp. at 262)).

learns – whether by means of in camera examination or otherwise – that the contents of an attorney-client communication itself demonstrate that the communication was in furtherance of a crime or fraud, the court should not permit the communication to be shielded from disclosure on grounds of attorney-client privilege. Such a communication self-evidently does not qualify for the privilege.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

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APPENDIX

Section 7602 of the Internal Revenue Code of 1954 (26 U.S.C.) provides in pertinent part:

EXAMINATION OF BOOKS AND WITNESSES

(a) AUTHORITY TO SUMMON, ETC.—For the purpose of ascertaining the correctness of any return, making a return where none has been made, determining the liability of any person for any internal revenue tax or the liability at law or in equity of any transferee or fiduciary of any person in respect of any internal revenue tax, or collecting any such liability, the Secretary is authorized—

(1) To examine any books, papers, records, or other data which may be relevant or material to such inquiry;

(2) To summon the person liable for tax or required to perform the act, or any officer or employee of such person, or any person having possession, custody, or care of books of account containing entries relating to the business of the person liable for tax or required to perform the act, or any other person the Secretary may deem proper, to appear before the Secretary at a time and place named in the summons and to produce such books, papers, records, or other data, and to give such testimony, under oath, as may be relevant or material to such inquiry; and

(3) To take such testimony of the person concerned, under oath, as may be relevant or material to such inquiry.

* * * * *

Section 7604 of the Internal Revenue Code of 1954 (26 U.S.C.) provides in pertinent part:

ENFORCEMENT OF SUMMONS

(a) JURISDICTION OF DISTRICT COURT – If any person is summoned under the internal revenue laws to appear, to testify, or to produce books, papers, records, or other data, the United States district court for the district in which such person resides or is found shall have jurisdiction by appropriate process to compel such attendance, testimony, or production of books, papers, records, or other data.

* * * * *

Section 7421 of the Internal Revenue Code of 1954 (26 U.S.C.) provides in pertinent part:

PROHIBITION OF SUITS TO RESTRAIN ASSESSMENT OR COLLECTION

(a) TAX. – Except as provided in sections 6212(a) and (c), 6213(a), 6672(b), 6694(c), and 7426(a) and (b)(1), and 7429(b), no suit for the purpose of restraining the assessment or collection of any tax shall be maintained in any court by any person, whether or not such person is the person against whom such tax was assessed.

* * * * *

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QUESTIONS PRESENTED

1. Whether otherwise privileged attorney-client communications are subject to district court review upon the mere invocation of the crime-fraud exception and in the absence of independent evidence of either a crime or fraud or that attorney-client communications were in furtherance thereof.

2. Whether, in the course of an action brought by the Internal Revenue Service to enforce a summons, a district court may issue a protective order prohibiting the IRS from violating 26 U.S.C. § 6103 by disclosing summoned information to Department of Justice attorneys who are defending the government in non-tax civil litigation.

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United States v. Zolin, 850 F.2d 610 (9th Cir. 1988) ... 24

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Secondary sources

Attorney General's Manual on the Administrative Procedure Act (1947) 48

K. Davis, *Administrative Law Treatise* (2d ed. 1983) ... 48

Jones, *On Evidence* (6th ed. 1972) 22

S. Saltzburg & K. Redden, *Federal Rules of Evidence Manual* (4th ed. 1986) 15, 22

J. Wigmore, *Evidence* (McNaughton rev. 1961) 10

IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

No. 88-40

UNITED STATES OF AMERICA,

Petitioner,

—v.—

FRANK S. ZOLIN, CHURCH OF SCIENTOLOGY OF CALIFORNIA AND MARY SUE HUBBARD,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR RESPONDENTS

OPINIONS BELOW

In addition to the opinions cited in the Brief for the United States, the opinion of Norris, J., concurring in the order of the *en banc* court (Resp. App. 1a-2a), is reported at 850 F.2d 610.

STATEMENT OF THE CASE

This case arises from the efforts of the Internal Revenue Service to obtain thirteen documents or tapes held under seal by the Clerk of the California Superior Court for Los Angeles County following a civil trial. The courts below denied the government access to eight items on various grounds. Of relevance

here are tape recordings (the "MCCS tapes") of meetings between Church of Scientology of California (hereinafter "the Church") representatives and legal counsel, production of which were denied on the ground that the tapes are protected by the attorney-client privilege (Pet. App. 28a). The courts below enforced the summons with respect to five documents, but ordered that these five documents "shall not be delivered to any other government agency by the IRS unless criminal tax prosecution is sought or an Order of Court is obtained." (Pet. App. 29a).

1. In July 1984, the Criminal Investigation Division of the Los Angeles District Director's Office of the IRS commenced a tax investigation of L. Ron Hubbard. On October 24, 1984, the IRS served an administrative summons upon the County Clerk for Los Angeles County, who also serves as Clerk for the California Superior Court for Los Angeles County, seeking production of numerous exhibits which were contained in the record of a pending Superior Court action entitled *Church of Scientology of California* v. *Armstrong* (No. C420153), and which remained under seal in the custody of the Clerk. The Clerk produced some of the documents, but refused to produce thirteen documents which the Superior Court had sealed on various grounds, including attorney-client privilege, marital privilege, and privacy (Pet. App. 12a).

On January 18, 1985, the government commenced this proceeding by filing a petition to enforce the summons. The Church and Mrs. Hubbard intervened in the district court to oppose enforcement of the summons on two grounds relevant here: (1) that the MCCS tapes are protected by the attorney-client privilege; and (2) that the summons had been issued for collateral purposes, *i.e.*, gathering information for use by other government agencies (Pet. App. 12a).

2. With respect to the MCCS tapes, as set forth more fully in Respondents' Brief in Opposition to the Petition For Writ of Certiorari, at 3-5, the Church established by declarations all the prerequisites of the attorney-client privilege. The government

asserted that the crime-fraud exception to the privilege applied and referred the court to excerpts from the tapes contained in the Declaration of Gerald Armstrong, dated September 6, 1984, and filed in an unrelated proceeding. While the district court had under consideration the Church's claim that the exception must be proved by independent evidence, the government submitted *sua sponte* a seventeen-page single-spaced transcript of the tapes. The district court then considered the transcripts and excerpts to determine whether the government had established the crime-fraud exception, and concluded that it had failed to do so (Pet. App. 28a). The district court specifically asked government counsel to "point out where I went wrong," and if there was "anything else you want to point to," to which government counsel replied negatively (April 30, 1985 Transcript of Proceedings, at 73, 80). During that hearing, the government never suggested that the court should or must go beyond the excerpts and transcripts and listen to the tapes themselves. The court subsequently denied the government's motion for reconsideration, which was based on an *ex parte in camera* affidavit and a request that the court listen to the tapes. The court held that the affidavit was untimely and that the government had waived its initial request that the court review the tapes (Pet. App. 25a-26a; J.A. 64).

3. The district court did hold that five of the thirteen documents sought by the government were relevant to the tax years under investigation and that any privileges had been waived (Pet. App. 28a). Prior to enforcing the summons as to the five documents, however, the district court held an evidentiary hearing on the good faith of the government. At the hearing, the Church adduced substantial evidence of coordination between the IRS agents responsible for issuing the summons and Justice Department attorneys representing the government in two civil rights actions brought by the Church against various governmental agencies and their employees, *Church of Scientology of California* v. *Linberg*, No. 77-2654 (C.D.Cal.) and *Founding Church of Scientology Inc.* v. *Director, Federal Bureau of Investigation*, No. 98-0107 (D.D.C.). The Church demonstrated that as part of its investigation of Mr. Hubbard the IRS

had summoned two witnesses and arranged to interview them in a hotel in Ventura, California, at which time government attorneys in the *Linberg* action were also present and reportedly interviewed the witnesses (Declaration of Donald C. Randolph in Support of Intervenor's Request for Discovery, at 10-11). The witnesses subsequently testified that they had spoken with the *Linberg* attorneys, one of whom was also an FBI agent, because they believed the IRS's summons compelled them to do so (September 20, 1984 Deposition of Diana Sue Reisdorf-Voegeding, at 5; September 21, 1984 Deposition of John Nelson, at 22-23, 39-40). Further, in the same time period in which the IRS issued the summons at issue here, government counsel in the *Founding Church* case filed a motion in the Superior Court seeking many of the same documents sought by the IRS's summons. IRS Agent Xanthos acknowledged that he had spoken with the government attorneys in the *Founding Church* case and discussed the sealed documents held by the Superior Court and how to obtain access to them (April 29, 1985 Transcript of Proceedings, at 36-37). He then put the government attorneys "in touch with my counsel" to discuss "what would be the best vehicle to make a motion with the Superior Court." (*Id.* at 37-38). Subsequently, his attorney did speak with the government attorneys, although Agent Xanthos, the only agent the court permitted the Church to examine, had no knowledge of the substance of those conversations (*Id.* at 38). Shortly after his conversations with government counsel, however, the IRS issued its summons. Finally, Agent Xanthos also acknowledged that another IRS Agent had had subsequent conversations with government counsel in the *Linberg* action (*Id.* at 29-30).

The District Court found that the IRS was in good faith conducting a criminal tax investigation of Mr. Hubbard and therefore enforced the summons as to relevant and non-privileged documents. It nonetheless considered the case *sui generis* because of the many non-tax related civil litigations between the government and the Church and because of its concern, undoubtedly founded on the evidence adduced by the Church, that "information acquired for one purpose may be in effect used for civil discovery in the other." (J.A. 67). Accordingly, it

issued a protective order requiring that the five documents "shall not be delivered to any other government agency by the IRS unless criminal tax prosecution is sought or an Order of Court is obtained." (Pet. App. 19a). The court emphasized that as long as an intended disclosure was authorized by 26 U.S.C. § 6103, it would be permitted (J.A. 60, 66, 68).

4. A panel of the United States Court of Appeals for the Ninth Circuit affirmed the district court's judgment (Pet. App. 11a-24a). The panel held that the district court order requiring that the IRS not deliver the five documents to any other government agency unless criminal tax prosecution is sought or a court order is obtained was an appropriate exercise of the district court's discretion. The panel reasoned that since the government had invoked the court's process to enforce the summons, the court had the power and authority to prevent its process from being abused. The panel rejected the government's argument that the order ran afoul of the Tax Anti-Injunction Act, 26 U.S.C. § 7421(a), relying on the decision in *United States* v. *Author Services, Inc.*, 804 F.2d 1520, 1526 (9th Cir. 1986), where the court reasoned that "restricting disclosure of summoned information to other agencies only to the extent that a court order is necessary, does not restrain the assessment or collection of tax liability." (Pet. App. 19a).

The panel affirmed the rulings of the district court with respect to the MCCS tapes. The panel applied the holding of *United States v. Shewfelt*, 455 F.2d 836, 840 (9th Cir.), *cert. denied*, 406 U.S. 944 (1972), that before the privileged status of the communications is lifted on the basis of the crime-fraud exception, the government must first make a *prima facie* showing independently of the communications of an ongoing crime or fraud (Pet. App. 21a-23a). The panel then reviewed the government's evidence and held that it was "not sufficient to make out the requisite prima facie showing of intended illegality." (Pet. App. 24a).

Thereafter, the government petitioned for rehearing and suggested rehearing *en banc* on both the order limiting disclosure to other agencies and the independent evidence rule, asserting

an intra-circuit conflict on the latter question between *United States v. Friedman*, 445 F.2d 1076 (9th Cir.), *cert. denied*, 404 U.S. 958 (1971), and *Shewfelt*, *supra*. On November 6, 1987, the petition for rehearing *en banc* was granted (Pet. App. 10a). Briefing and oral argument were limited to the crime-fraud exception issue (J.A. 9-10).

On March 28, 1988, the *en banc* court filed an order vacating the November 6, 1987 order granting *en banc* review as improvidently granted because it concluded there was no conflict between the panel decisions in *Shewfelt* and *Friedman* (Pet. App. 1a-2a). The *en banc* court ordered that the portion of the panel opinion that questioned whether *Shewfelt* should be reviewed *en banc* be withdrawn and, "in all other respects," that the panel opinion remain intact (Pet. App. 2a). The *en banc* court also reformulated the independent evidence rule as stated in *Shewfelt* and by the panel: "The government must make a *prima facie* showing, independent of the communications involved, that the attorney-client communications were in furtherance of an intended or present illegality." (Pet. App. at 2a).

Three members of the *en banc* court dissented from the order vacating the November 6, 1987 order, but stated that they nevertheless would affirm the district court (Pet. App. 2a-9a.) The dissenters would have created a rule that would "make in camera review discretionary for the district court to reject the crime-fraud exception, mandatory for the district court to allow the exception and order disclosure." (Pet. App. 9a). The dissenters would have affirmed because the district court did not abuse its discretion in rejecting the crime-fraud exception based on the partial transcripts. The dissent also found that the district court did not abuse its discretion in considering only the transcripts initially submitted by the government and in not considering the material submitted for the first time on reconsideration (Pet. App. 9a).[1]

1 In a separate concurrence filed several months later, Judge Norris found it procedurally unclear whether the *en banc* order was a disposition on the merits and opined that if so, it is internally inconsistent because the *en banc* court cannot both decide a case on the merits and vacate its order granting *en banc* review. Nonetheless, the concurrence agreed that the independent evidence rule should be the law (Resp. App. 1a-2a).

SUMMARY OF ARGUMENT

I.

The attorney-client privilege, by encouraging full and frank communication between attorneys and clients, serves vital interests in a society ruled by law. Nevertheless, the privilege must give way when the opponent of the privilege establishes a *prima facie* case that the communications are in furtherance of intended illegality. The issue here is how the *prima facie* case may be shown without damaging the values served by the privilege and without overburderning judicial resources by unnecessarily forcing extensive review of otherwise privileged communications.

The government takes the position that mere invocation of the crime-fraud exception suffices to obtain judicial review of the communications. Yet the government would apparently leave to the standardless discretion of the district courts the determination of when the communications should be reviewed, thereby creating the sort of uncertainty in the privilege that this Court has condemned. Unsurprisingly, few, if any, courts have followed the route suggested by the government. Indeed, it is the government's position that may more accurately be characterized as "maverick." Rather, most courts have employed in practice a rule that requires the privilege's opponent to proffer independent evidence that the crime-fraud exception applies before the court will devote its resources to review of the communications. This rule has generally taken one of two forms, exemplified by the two rulings of the court of appeals below: 1) requiring independent evidence both of a crime or fraud *and* that the communications furthered the illegality, *see Zolin*, 842 F.2d 1135, 1136 (Pet. App. 2a) (*en banc* order); or 2) requiring independent evidence only of the crime or fraud, *see Zolin*, 809 F.2d 1411, 1418 (Pet. App. 21a) (panel

opinion). Courts have routinely permitted *in camera* review *after* a determination that one or the other standard has been met as a means to prevent overbroad disclosure of attorney-client communications.

The panel opinion below, which followed the second version of the independent evidence rule set forth above, found insufficient evidence to make out even a *prima facie* case of intended illegality. Therefore, respondents must prevail under either version of the rule.

II.

A. The government urges this Court to impose an extraordinary limitation on the authority of the district courts in summons enforcement proceedings. According to the government, a court may only enforce or deny enforcement of a summons. It may not, as the district court did here, enforce the summons and issue a protective order prohibiting the IRS from violating 26 U.S.C. § 6103 by disclosing the very material summoned in ways wholly unrelated to its tax investigation.

This all or nothing approach is inconsistent with the inherent power of the federal courts to prevent their process from being abused. Congress expressly recognized this power by providing in 26 U.S.C. § 7604(a) that district courts have jurisdiction "by appropriate process" to enforce IRS summonses, and this Court, in its seminal decision in *United States* v. *Powell*, 379 U.S. 48, 58 (1964), instructed the courts to be vigilant in summons enforcement proceedings to prevent abuses of their process. Among the abuses which courts have long recognized is the improper disclosure of confidential information obtained through invocation of their process. Courts routinely issue protective orders in discovery proceedings and in administrative subpoena enforcement proceedings to ensure that information obtained through their process is not improperly disclosed.

The government's all or nothing approach also forces a court to make an unnecessary choice between denying enforcement of a summons despite the government's interest in unpaid taxes or enforcing a summons despite the violation of the taxpayer's

confidentiality which will result. There is no reason for sacrificing either of these interests since the issuance of a protective order can accommodate both.

B. The government relies on the presumption against imposing restrictions on the IRS's summons power in the absence of an unambiguous congressional directive. Section 6103, however, is precisely such an unambiguous congressional directive. It reflects Congress' broad judgment that, except in narrowly delineated circumstances, the IRS should not disclose tax information, including information obtained through the summons power. Furthermore, this Court has repeatedly recognized that the presumption's underlying concern is that the IRS have those powers necessary for the effective enforcement of the tax laws. It is therefore inapposite here. The purpose of the district court's order was to ensure that the IRS not disclose the summoned records to Department of Justice attorneys representing the government in non-tax civil litigation with the Church. These disclosures would clearly have violated § 6103(a) and were unrelated to the IRS's tax investigation. Thus, the protective order could not have hampered the IRS's investigation.

Nor would litigation over the appropriateness of protective orders unduly burden summons enforcement proceedings. Taxpayers resisting enforcement of a summons ordinarily submit at the outset all available evidence of past or intended unlawful disclosures to demonstrate the IRS's bad faith. Thus, ruling on the appropriateness of a protective order would not require the submission of additional evidence. The district courts, morever, are armed with summary procedures designed to ferret out unmeritorious taxpayer claims and prevent unnecessary delay.

C. The government also relies on Congress' failure to provide expressly for injunctive relief against disclosures which violate § 6103. Whether or not injunctive relief is available, however, is entirely irrelevant. A protective order is not an injunction under the Federal Rules of Civil Procedure or the statutes of the United States. It is issued against the party invoking the court's process in order to prevent the court's process from being abused. Section 6103, moreover, merely sets

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C. The government also relies on Congress' failure to provide expressly for injunctive relief against disclosures which violate § 6103. Whether or not injunctive relief is available, however, is entirely irrelevant. A protective order is not an injunction under the Federal Rules of Civil Procedure or the statutes of the United States. It is issued against the party invoking the court's process in order to prevent the court's process from being abused. Section 6103, moreover, merely sets

forth the substantive rules governing disclosure. It would be extraordinary had Congress intended to oust the courts of the fundamental and inherent power to prevent their process from being abused without any express indication of its intent.

Furthermore, although it is unnecessary to reach the issue here, Congress did contemplate that predisclosure relief would be available to prevent violations of § 6103. Injunctive relief would clearly further the legislative purpose to protect the confidentiality of tax information, and Congress nowhere indicated that the statutory post-disclosure remedies were intended to be exclusive. In any event, predisclosure judicial review is available under the Administrative Procedure Act, 5 U.S.C. §§ 701-06.

ARGUMENT

I.

AN INDEPENDENT EVIDENCE RULE, FOLLOWED IN PRACTICE BY NUMEROUS FEDERAL COURTS, BALANCES THE EFFICIENT USE OF JUDICIAL RESOURCES AND THE VITAL INTERESTS SERVED BY THE ATTORNEY-CLIENT PRIVILEGE WITH SOCIETY'S INTEREST IN PREVENTING ABUSE OF THAT PRIVILEGE

A. Only An Independent Evidence Requirement Prior To Judicial Examination of Otherwise Privileged Attorney-Client Communications Can Balance The Interests at Stake

As the government notes, the attorney-client privilege is the oldest of the confidential communications privileges recognized at common law. *See* 8 J. Wigmore, *Evidence* § 2290 (McNaughton rev. 1961). The purpose of the privilege is "to encourage full and frank communication between attorneys and their clients and thereby promote broader public interests in the observance of law and administration of justice." *Upjohn Co.* v. *United States*, 449 U.S. 383, 389 (1981). These vital interests can be served only if individuals and organizations are able to obtain "the aid of persons having knowledge

of the law and skilled in its practice, which assistance can only be safely and readily availed of when free from the consequences or the apprehension of disclosure." *Id.* (quoting *Hunt* v. *Blackburn*, 128 U.S. 464, 470 (1888)); *see Fisher* v. *United States*, 425 U.S. 391, 403 (1976). Indeed, "the attorney-client privilege is central to the legal system and the adversary process. For these reasons, the privilege may deserve unique protection in the courts." *United States* v. *Hodge & Zweig*, 548 F.2d 1347, 1355 (9th Cir. 1977).

The courts have long recognized that the privilege does not extend to a client's communications with an attorney that are designed to perpetrate present or future crime or fraud. *See, e.g., Clark* v. *United States*, 289 U.S. 1, 15 (1933).[2] However, otherwise privileged communications can be stripped of that confidential status only when the opponent of the privilege makes out a *prima facie* case that the communications were made in the furtherance of a future or ongoing crime or fraud. *See, e.g., id.* at 15; *In Re Grand Jury Investigation*, 842 F.2d 1223, 1226 (11th Cir. 1987). Indeed, all courts since *Clark* have recognized the need for a *prima facie* showing prior to the removal of the privilege.[3]

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2 It is equally well-settled that the crime-fraud exception does not apply to communications concerning past acts; such consultations, often made to insure that future acts are in compliance with law, lie at the heart of the privilege. *In re Antitrust Grand Jury*, 805 F.2d 155, 162 (6th Cir. 1986). Here, the district court, after examining the government's transcripts of the communications themselves, found that the submissions at most tended to show or admit past fraud (Pet. App. 28a).

3 The government does not challenge here the ruling of the courts below that the disputed communications otherwise qualify as attorney-client privileged communications. Thus, the burden has shifted to the government to make the requisite *prima facie* showing. *See, e.g., Antitrust Grand Jury*, 805 F.2d at 164. Nevertheless, the government asserts that "it must be assumed at this stage of the litigation that the MCCS tapes . . . are outside the scope of the attorney-client privilege." Gov't Br. at 41-42. However, the government failed to meet its burden before both the district court, which carefully considered the transcripts of the communications, and the Court of Appeals, which examined the independent evidence of alleged ongoing crime

Thus, the only issue before this Court is how the opponent of the privilege may make this *prima facie* showing. The clear thrust of the government's position, both in the lower courts and implicitly in this Court, is that mere invocation of the crime-fraud exception should result in judicial review in virtually all cases in which the opponent seeks such review (Gov't Br. at 44-45). This rule would chill attorney-client communications, would put enormous strain on judicial resources, and would drastically alter the balance between disclosure and privilege struck by most courts that have considered the issue.

When confronted with the broad implications of a rule that would *require in camera* review of often extensive communications upon the mere incantation of the magic words "crime or fraud," the government retreats to a position of studied ambiguity. The government disclaims an intent to argue for "an absolute requirement for review" (Reply Brief for United States in Support of Petition for Writ of Certioriari at 9 n.7; Gov't Br. at 42-43 n.23), but it provides no guidance for evaluating when assertions of the crime-fraud exception should lead to *in camera* review of the disputed communications. The government's inability to articulate an alternative standard is logically inevitable; either the district court must *always* review the communciations, or it may do so only when the opponent of the privilege meets some threshold level of independent evidence, or it must be given unbridled and standardless discretion to review the communications when it chooses. Having pulled back from the untenable first option, and having rejected the second option, the government in effect argues for standardless discretion.[4] But by replacing the independent evidence rule with a standard-

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or fraud. Thus, the presumption at this stage must be that the conversations are privileged and that the crime-fraud exception does not apply. Moreover, contrary to the government's assertion, neither the panel opinion nor the *en banc* order "assumed arguendo that the government's submissions" had established the necessary *prima facie* case. Gov't Br. at 42.

4 Similarly, the *en banc* dissent below would leave the decision to the district courts without any standards or requirement of a threshold showing: "[a] district court . . . would decide for itself whether a given case warrants . . . in camera review according to the circumstances." (Pet. App. 6a).

less discretion in the district court to invoke *in camera* review, the government would create precisely the sort of uncertainty in the privilege which "results in widely varying applications by the courts" and which this Court condemned as "little better than no privilege at all." *Upjohn Co.*, 449 U.S. at 393.

The kinds of problems confronted by attorneys that led the Court in *Upjohn* to reject the uncertain and narrow "control group test," 449 U.S. at 392-93, are common to many of the situations in which the crime-fraud exception issue arises. Corporations and other institutions that seek legal advice in order to structure their affairs to comply with complex tax and other rules, as well as to defend against allegedly improper past conduct, must be assured that their communications will remain confidential, even from the court, absent some extrinsic evidence that they are actually engaged in wrongdoing. If clients are instructed by their attorneys that their communciations may be reviewed by judges even absent extrinsic proof of crime or fraud, many undoubtedly will be unwilling to engage in the open and frank discussions of past actions and the exploration of possible future acts (including determination of whether such acts would be lawful) which the attorney-client privilege is intended to encourage and protect.

Accordingly, before a court should review the otherwise privileged communications themselves, the opponent of the privilege should be required to produce evidence, independent of the communications themselves, to indicate that the privileged communications were in furtherance of a crime or fraud. Alternatively, the privilege's opponent must demonstrate by independent evidence that there is at least an ongoing crime or fraud. Either of these threshhold standards are logical and practical means by which to balance the need to preserve attorney-client confidences and judicial resources against the proper refusal to grant privileged status to communications in furtherance of crime or fraud.

Most courts have, *sub silentio*, applied some version of the independent evidence rule before undertaking to review or require release of the privileged communications. *See* Part I C,

infra. Contrary to the government's assertions, the rulings below are in no way "maverick." Indeed, it has been the exceptional case in which a court has undertaken to review the privileged communications without first satisfying itself that the opponent of the privilege has produced some independent evidence to support its assertions.

B. An Independent Evidence Rule Does Not Preclude *In Camera* Review Of Privilege Claims

It is simply untrue that an independent evidence rule "is clearly an absolute bar to any consideration by the district court of the contents of the communication itself." (Gov't Br. at 42 n.23). An independent evidence rule requires only that there be some evidence to support the allegations of crime or fraud before an attorney must open his files and before the court must undertake the laborious process of reviewing what may often be massive quantities of documents. Indeed, as set forth, *infra*, Part I C, many courts have found *in camera* review mandatory before permitting release of particular communications in order to ensure that they are in fact within the scope of the crime-fraud exception.

The government's reliance upon several cases that reviewed documents *in camera* to determine a *proponent's* claims of attorney-client privilege are irrelevant to the propriety of the independent evidence rule.[5] Each of these cases involved the question whether the proponent of the attorney-client privilege satisfied his burden of establishing all essential elements of the privilege. None involved any question related to the crime-fraud exception. In each of these cases, the party claiming the privilege submitted the documents for *in camera* review in an attempt to meet its burden of establishing the elements of the privilege. Respondents do not assert that if the *proponent* of the

5 The government cites to *Hodges, Grant & Kaufman* v. *United States*, 768 F.2d 719 (5th Cir. 1985); *United States* v. *Lawless*, 709 F.2d 485 (7th Cir. 1983); *In re Grand Jury Witness (Salas)*, 695 F.2d 359 (9th Cir. 1982); and *United States* v. *Osborn*, 561 F.2d 1334 (9th Cir. 1977). Gov't Br. at 44-45.

privilege is able to sustain its burden only by submitting the communications to the court, the court may not then consider the same communications to determine if the opponent of the privilege has established that the crime-fraud exception applies.[6]

But here, respondents established their entitlement to the privilege by declarations, without the necessity of presenting the communications to the court. The issue now is whether the opponent of the privilege is entitled to judicial review of previously unreviewed communications determined to be privileged upon the mere assertion that the crime-fraud exception applies.

C. Experience Has Shown An Independent Evidence Rule To Be An Effective Means Of Balancing The Competing Interests At Stake

Many of the courts that have considered the crime-fraud exception have explicitly or implicitly applied a two-part analysis to the showing required to invoke the crime-fraud exception. As stated by one court:

> the government must first make a prima facie showing of a violation sufficiently serious to defeat the privilege, and second, establish some relationship between the communication at issue and the prima facie violation.

6 *Kerr* v. *United States District Court*, 426 U.S. 394 (1976), is also inapposite. That case involved a claim of *qualified* governmental privilege that could be outweighed by the plaintiffs' need for the documents, and a claim of irrelevancy. *Id.* at 405. The *in camera* review suggested by this Court in *dictum* would have permitted resolution of the irrelevancy issue and the balance to be struck between privilege and need. Thus, *in camera* review would determine whether the proponent had established its right to a qualified privilege. By contrast, no showing of need can overcome the attorney-client privilege. *See* S. Saltzburg & K. Redden, *Federal Rules of Evidence Manual* 359 (4th ed. 1986).

Similarly, in *United States v. Nixon*, 418 U.S. 683 (1974), the court recognized only a qualified Presidential privilege that may be outweighed by "the legitimate needs of the judicial process." *Id.* at 707. *In camera* review was ordered only after "the Special Prosecutor had made a sufficient showing to rebut the presumption" of privilege. *Id.* at 713-14. The Court then detailed the importance of careful *in camera* review to protect the Presidential privilege against overbroad disclosure. *Id.* at 714-16.

In Re Sealed Case, 754 F.2d 395, 399 (D.C.Cir. 1985) (footnote omitted). Numerous courts have reviewed only independent evidence to determine if a *prima facie* case has been made as to both parts. This method of analysis is consistent with the position taken by the *en banc* court below. "[T]he government must make a prima facie showing, independent of the communications involved, that the attorney-client communications were in furtherance of an intended or present illegality." *Zolin*, 842 F.2d at 1136 (Pet. App. 2a). Only after such a showing have the courts reviewed the particular communications to ensure that they fall within the exception.

Other courts have relied on independent evidence to establish the first prong—a *prima facie* case of crime or fraud—and only then have they reviewed the communications to determine if the second prong was met—that the communications were in furtherance of the crime or fraud. This position corresponds closely to that taken in *Shewfelt* and by the panel below. " '[B]efore the privileged status of [attorney-client] communications can be lifted, the government must first establish a prima facie case of fraud *independently* of said communications.' " 809 F.2d at 1418 (Pet. App. 21a) (quoting *Shewfelt*, 455 F.2d at 840) (emphasis added in *Zolin*). In *Shewfelt*, the government established a *prima facie* case of intended illegality and the communications were reviewed. 455 F.2d at 840.

These cases, discussed *infra*, which require that one or both prongs of the crime-fraud analysis be satisfied by independent evidence, demonstrate that the Ninth Circuit's position is well within the mainstream of actual judicial practice and experience. The cases also refute the government's primary argument against the independent evidence rule: that the rule makes it extremely difficult, if not impossible, for the opponent of the privilege to invoke the crime-fraud exception. On the contrary, in many of these cases, the government was able to establish by independent evidence not only a *prima facie* case of crime or fraud, but also that the attorney-client communications were in furtherance thereof.[7]

7 Moreover, the government's approach to the attorney-client privilege simply ignores the fundamental reality of privilege law that every privilege creates a potential for loss of unprivileged, relevant evidence. The function of the federal courts under Fed. R. Evid. 501 is to strike a careful balance between disclosure rules and the values that the privilege protects.

Experience shows that the independent evidence rule rarely, if ever, hinders a prosecutor's efforts to make a *prima facie* case that would vitiate the privilege. The rule simply requires that the government engage in its usual investigative activities, including convening grand juries and issuing subpoenas for material unrelated to attorney-client communications, rather than attempting in the first instance to uncover an alleged crime or fraud by breaching the confidential attorney-client relationship. At the same time, the rule strikes a reasonable balance in protecting judicial resources from the mere invocation of the crime-fraud exception and prevents wholesale exposure to the court of the entire attorney-client relationship. Any lesser standard would unduly burden the courts and lead to overexposure of privileged communications.

Even *in camera* review itself chills attorney-client communications, speculation of the *en banc* dissent to the contrary notwithstanding. *Zolin*, 842 F.2d at 1137-38 (Pet. App. 5a-6a). It is unrealistic to believe that clients in need of legitimate advice on highly sensitive topics would distinguish between revelations to the court and to the government, particularly if informed by conscientious counsel that in the event of even an unsupported allegation of the crime-fraud exception, all attorney-client communications must be turned over to the court for review. Moreover, exposure to the entirety of frank attorney-client communications, even if the court determined that all remained privileged, would in some cases strongly influence the court's attitude towards the client, especially in non-jury cases.[8]

8 A procedure in which *in camera* review was carried out by a judge or magistrate otherwise unconnected to the case would only multiply the strain on judicial resources that the government's position would create. Moreover, even if one presumes that the government will be prudent in seeking attorney-client disclosures *in camera*, one cannot reasonably make the same prediction with respect to private civil litigation, where the crime-fraud exception applies with equal force. *See, e.g., Pritchard-Keang Nam Corp.* v. *Jaworski*, 751 F.2d 277 (8th Cir. 1984).

1. Numerous Courts Have Relied Solely upon Independent Evidence to Analyze the Crime-Fraud Exception

The rule enunciated by the *en banc* court below, under which both prongs of the crime-fraud exception are to be satisfied by independent evidence, has been followed in practice by many courts. While these cases do not explicitly adopt an independent evidence rule, they show that such a rule is a workable means of analyzing the crime-fraud exception, and that the rule is within the mainstream of judicial experience.

For example, in *In Re Grand Jury Investigation*, 842 F.2d 1223 (11th Cir. 1987), the court relied exclusively upon independent evidence to resolve both prongs of its explicit two-part inquiry. *Id.* at 1226-27. Only after finding the privilege inapplicable based on the independent evidence both of a crime and fraud and of attorney-client communications in furtherance thereof, did the court affirm the district court's order that "permits [the attorney] to submit to the court for an *in camera* review any documents he believes remain privileged." *Id.* at 1228. Thus, *in camera* review was used to *protect* the privilege from overbroad disclosure *after* the exception was found applicable, but was not used to determine the applicability of the exception.

Again, in *In Re Sealed Case*, 754 F.2d 395 (D.C.Cir. 1985), the court relied exclusively on independent evidence to find the government had made a *prima facie* showing of ongoing crime and fraud. *Id.* at 398, 400.[9] The court then relied upon the same independent evidence to determine that counsel's representation was in furtherance of the illegal scheme, "whether they realized it or not." *Id.* at 402. At no time did the district or circuit court review the privileged communications, *in camera* or otherwise, before revoking the attorney-client privilege.[10] *See*

9 The *in camera* submission in that case was *not* the disputed communications, but rather independent evidence in the government's possession related to destruction of evidence. *Id.* at 398, 400.

10 The court did "require[ ]" that the district court make a "question-by-question determination" of the application of the crime-fraud exception to the grand jury testimony of the attorneys in order to protect the communications from unnecessary disclosure. *Id.* at 403.

also In re Sealed Case, 737 F.2d 94, 101 n.10 (D.C. Cir. 1984) (affirming finding that privileged communications did not fall within the crime-fraud exception, and "reject[ing] the government's contention that the district court should have questioned [counsel] on this conversation *in camera, ex parte*"); *In re Special September 1978 Grand Jury*, 640 F.2d 49, 59-61 (7th Cir. 1980) (examining grand jury material submitted by the government *in camera* to determine ongoing fraud, but not the communications themselves);[11] *Sound Video Unlimited, Inc.* v. *Video Shack, Inc.*, 661 F. Supp. 1482, 1486-89 (N.D. Ill. 1987) (relying on independent evidence to establish in part and to reject in part both prongs of the crime-fraud exception); *cf. In Re Grand Jury Subpoena Duces Tecum*, 731 F.2d 1032, 1041 (2d Cir. 1984) (although documents submitted *in camera*, crime-fraud exception established "[w]ithout having resort to the documents themselves").

Other courts have followed the practice of allowing *in camera* review to protect against overbroad disclosure after finding, by independent evidence, both prongs of the crime-fraud exception. *See, e.g., In Re Grand Jury Proceedings*, 723 F.2d 1461, 1467 (10th Cir. 1983); *In Re John Doe Corp.*, 675 F.2d 482, 486-87, 491 (2d Cir. 1982); *Pfizer, Inc.* v. *Lord*, 456 F.2d 545, 549-51 (8th Cir. 1972).

In *Pritchard-Keang Nam Corp.* v. *Jaworski*, 751 F.2d 277 (8th Cir. 1984), *cert. dism'd*, 472 U.S. 1022 (1985), the district court had reviewed the disputed document *in camera* and ordered it produced under the crime-fraud exception. *Id.* at 280. On appeal, however, the Eighth Circuit, relying solely on extrinsic evidence, found that the disputed document was not in

11 In several cases, courts have examined *in camera* grand jury or other confidential materials submitted by the *government*. These *in camera* submissions to protect the secrecy of the government's investigation must not be confused with the *in camera* submission of the disputed privileged communications. *See, e.g., In re Sealed Case*, 676 F.2d 793, 815 n.90 (D.C. Cir. 1982) (opinion of Wright, J.) (apparently confusing *in camera* submission of government evidence in *Special September 1978 Grand Jury*, 640 F.2d at 56-57, with issue of submission of the disputed communications).

furtherance of a crime or fraud. *Ia.* at 282-83.[12] Moreover, the court questioned the sufficiency of the *prima facie* showing of fraud, which had been made exclusively on independent evidence. *Id.* at 283 n.6.

2. Other Courts Have Relied upon Independent Evidence to Show at Least an Ongoing Crime or Fraud

In *Clark* v. *United States*, *supra*, this Court analogized the privilege of jury deliberations to the attorney-client privilege in the context of a crime-fraud issue. 289 U.S. at 15. The Court held:

> There must be a showing of a prima facie case sufficient to satisfy the judge that the light should be let in. Upon that showing being made, the debates and ballots in the jury room are admissible as corroborative evidence, supplementing and confirming the case that would exist without them.

Id. at 14 (footnote omitted). This Court then considered evidence independent of the events in the jury room to establish a *prima facie* case of crime or fraud. Only after finding that "the evidence of guilt is ample, without the happenings in the jury room," *id.* at 18, did the Court "let in the light" on the otherwise privileged jury deliberations, *id.*

In *In re Antitrust Grand Jury*, 805 F.2d 155 (6th Cir. 1986), the court also relied upon independent evidence consisting of grand jury testimony and facts of a related case to establish a *prima facie* case of illegality. *Id.* at 164, 166. The court then authorized the examination of the communications *in camera* to determine which, if any, specific communications fell within the crime-fraud exception. *Id.* at 168. This *in camera* review was ordered in response to the district court's ruling that all the disputed documents be produced *en masse*, and it was specifically intended to protect against the release of privileged communications that did not fall within the crime-fraud exception.[13] *Id.* at 168.[14]

12 Although that court believed the disputed document might help to prove a fraud, it was held privileged because it was not prepared in furtherance of the fraud. 751 F.2d at 283.

Several courts have also permitted or refused discovery of otherwise privileged attorney fee and client identity information based upon whether the government had established by independent evidence a *prima facie* case of an ongoing criminal conspiracy as to which obtaining legal services was a part of the conspiracy. *See, e.g., In Re Grand Jury Proceedings*, 680 F.2d 1026, 1028 (5th Cir. 1982); *In Re Grand Jury Proceeding in*

13 The government is mistaken in stating that the district court "refus[ed] to apply the crime-fraud exception." Gov't Br. at 45. The Court of Appeals ordered *in camera* review because the district court ordered *production* of the communications "*en masse*" without determining whether they were in furtherance of the violation shown by independent evidence. 805 F.2d at 168. In context, the clear import of the court's statement that the district court should have reviewed the documents *in camera* was to limit disclosure in light of the fact that the government's independent evidence of the illegality "is grand jury testimony not subject to disclosure," and hence, not subject to challenge by the privilege's proponent.

14 *See also United States* v. *Dyer*, 722 F.2d 174, 176, 178 (5th Cir. 1983) (*prima facie* case shown by letter and taped conversations between defendant and informant); *In re Murphy*, 560 F.2d 326, 338-39 (8th Cir. 1977) (*in camera* review of documents to determine "if they bore a close relationship to [the] fraud" established by independent evidence); *United States* v. *Bob*, 106 F.2d 37, 40 (2d Cir.) (crime shown by independent evidence prior to admission of attorney's testimony), *cert. denied*, 308 U.S. 589 (1939); *In Re National Mortgage Equity Corp. Mortgage Pool Certificates Litigation*, 116 F.R.D. 297, 300-02 (C.D.Cal. 1987) (*in camera* review of *particular* communications to determine whether they are within the scope of the exception made by independent evidence); *Shirvani* v. *Capital Investing Corp., Inc.*, 112 F.R.D. 389, 391 (D. Conn. 1986) ("wiser course may usually be to require some such showing [of *prima facie* crime or fraud] which is independent of the very communications sought"); *Coleman* v. *American Broadcasting Cos., Inc.*, 106 F.R.D. 201, 203, 209 (D.D.C. 1985) (opponents of the privilege "failed to make an adequate factual showing to even require an *in camera* examination of documents or other materials for which the privilege has been claimed," noting absence of "*independent evidence* from depositions of witnesses or from document production that the attorney affirmatively participated in" illegal activities) (emphasis added); *cf. In Re International Systems and Controls Corp. Securities Litigation*, 693 F.2d 1235, 1242-43 & n.11 (5th Cir. 1982) (apparently requiring that *prima facie* showing of ongoing fraud be made by independent evidence).

Matter of Fine, 641 F.2d 199 (5th Cir. 1981); *In Re Grand Jury Proceedings*, 600 F.2d 215 (9th Cir. 1979); *Hodge & Zweig*, *supra*, 548 F.2d at 1354-55.

Not only have most courts applied in practice some version of the independent evidence rule, but commentators have recognized it as well.[15] The government is simply wrong when it states that the secondary sources "confirm" that the independent evidence rule is a "maverick" one (Gov't Br. at 46).

3. Cases Cited by the Government Do Not Support the View that Courts Have Uniformly Rejected an Independent Evidence Rule

The government cites to six cases that discuss the crime-fraud exception, ignoring the many cases, discussed *supra*, that applied in practice an independent evidence rule. As shown, *supra*, *Antitrust Grand Jury*, 805 F.2d 155, in fact relied upon independent evidence to show an antitrust violation. Similarly, *In re Sealed Case*, 676 F.2d 793 (D.C. Cir. 1982), relied upon extensive independent evidence to uphold a *prima facie* showing of crime or fraud. *Id.* at 798-802; *id.* at 813 (opinion of Wright, J.). Judge Wright merely suggested, without any discussion,

15 *See, e.g.*, S. Saltzburg & K. Redden, *Federal Rules of Evidence Manual* 359 (4th ed. 1986) ("The common law rule is . . . [that] the Trial Judge must *first* determine that the government has made a *prima facie* case that the privilege does not apply because the communication was in furtherance of a crime or fraud. *Only then* should the Trial Judge look at the documents.") (emphasis added); 3 Jones, *On Evidence* § 21:18 at 795-96 (6th ed. 1972) ("There should be some independent proof of wrongful purpose; the mere suggestion of fraud does not afford sufficient ground for setting aside the general rule."). Given that proposed Fed. R. Evid. 503(d)(1) was rejected, the commentary upon which the government relies, Gov't Br. at 46, should be given little weight, at best. In any event, the commentary goes only to the second prong of the analysis, and not to the showing of the crime or fraud. Moreover, Rule 501 requires that the privilege should be governed by the common law. At the time of Rule 501's adoption in 1975, the leading cases such as *Clark*, *supra*, *Bob*, *supra*, and *Shewfelt*, had recognized that the *prima facie* showing of crime or fraud must be made by independent evidence before "let[ting] in the light." *Clark*, 289 U.S. at 18.

"In appropriate cases the subpoenaed material itself may provide *prima facie* evidence of a violation." *Id.*[16]

Three of the cases contain no discussion of how the crime-fraud exception must be shown, nor do they indicate whether the parties ever challenged the propriety of submitting the documents *in camera*, nor whether they had been submitted as part of the proponent's attempt to establish the privilege. *See, e.g.*, *In re Grand Jury Proceedings*, 604 F.2d 798, 799-800, 803 (3d Cir. 1979); *Union Camp Corp.* v. *Lewis*, 385 F.2d 143 (4th Cir. 1967); *Irving Trust Co.* v. *Gomez*, 100 F.R.D. 273, 275 (S.D.N.Y. 1983) (disputed documents "were presented to the Court on the consent of the parties for *in camera* inspection").

The only appellate court that has considered and explicitly rejected an independent evidence rule is *In Re Berkley & Co., Inc.*, 629 F.2d 548 (8th Cir. 1980).[17] The issue was argued by the proponent only "[i]n a brief footnote," and the court's response was likewise limited to a brief footnote. *Id.* at 553 n.9. The court then relied upon extensive independent evidence as well as nineteen disputed documents to determine both the existence of a crime or fraud and that the attorney-client communications were in furtherance of that scheme. *Id.* at 550, 552-53.[18] Moreover, the Eighth Circuit in *Pritchard-Keang Nam Corp.*, *supra*, implicitly modified or overruled *Berkley*'s rejec-

16 *See In re Sealed Case*, 754 F.2d 395, 403 (D.C.Cir. 1985) (Mikva, J., concurring) (discussion of the crime-fraud exception in *In re Sealed Case*, 676 F.2d at 812-16, expressed only the views of Judge Wright); *see also* note 11, *supra*.

17 *United States* v. *King*, 536 F. Supp., 253 (C.D. Cal. 1982), refused to follow *Shewfelt*'s limited independent evidence rule, but, ironically, found "there is evidence independent of the April 7 conversation to establish a prima facie case of criminal activity." *Id.* at 262.

18 Indeed, the district court review of the documents in *Berkley* focused primarily on whether the proponent had established the elements of the privilege. Only 19 of some 264 documents were found privileged prior to consideration of the crime-fraud exception. *Id.* at 552. While the opinion is less than clear, *Berkley* appears to be a case in which the *proponent* of the privilege could not substantiate his claim of privilege without *in camera* review of the communications, and cannot then complain that the court also reviewed the documents for evidence of the crime-fraud exception.

tion of an independent evidence rule. It is *Berkley* that is truly the "maverick" decision on this issue.

D. Respondents Prevail Under Either Version Of The Independent Evidence Rule

Under either version of the independent evidence rule, the panel opinion below must be affirmed.[19] Obviously, if the Court agrees that both prongs of the *prima facie* case must be satisfied by independent evidence, then there is no question that the government failed to meet this burden. Even as to the first prong—an ongoing crime or fraud—the Court of Appeals panel found that the government failed to establish a *prima facie* case by independent evidence. Indeed, the panel analyzed only the first prong of the crime-fraud exception, holding that the showing of illegality must be by independent evidence. "In *Shewfelt*, we said that 'before the privileged status of [attorney-client] communications can be lifted, the government must first establish a prima facie *case of fraud independently* of said communications.' " *Zolin*, 809 F.2d at 1418 (Pet. App. 21a) (quoting *Shewfelt*, 455 F.2d at 840) (emphasis added and original).

The panel then reviewed "[t]he Government's independent evidence *of intended illegality*." *Id.* (Pet. App. 23a) (emphasis added). This independent evidence of alleged crime or fraud consisted of general allegations that members of the Church planned to violate tax laws or possibly engage in fraud. *Id.* at 1418-19 (Pet. App. 23a-24a). The court, upon review of this evidence, correctly found it "not sufficient to make out the requisite prima facie showing of intended illegality." *Id.* at 1419

19 The order to rehear the case *en banc* was vacated as improvidently granted and, with the deletion of the question whether *Shewfelt* should be reviewed *en banc*, "[t]he opinion of the three-judge panel will stand in all other respects." *Zolin*, 842 F.2d at 1136 (Pet. App. 2a). Thus, the panel opinion is the extant opinion on the application of the independent evidence rule to the facts for purposes of this Court's review. *See also Zolin*, 850 F.2d 610 (Resp. App. 2a) (Norris, J., concurring).

(Pet. App. 24a).[20] Given the paucity of independent evidence of illegality, this decision was not an abuse of discretion, *see Grand Jury Investigation*, 842 F.2d at 1226, and therefore, under either version of the independent evidence rule, the judgment below should be affirmed.[21]

E. *Bourjaily* is Irrelevant to the Privilege Issue Here

The government's reliance upon *Bourjaily* v. *United States*, 483 U.S. 171, 107 S.Ct. 2775 (1987), which concerned the admissibility at trial of a co-conspirator's hearsay statement under Fed. R. Evid. 801(d)(2)(E), is simply irrelevant to the privilege issue here. The Court merely held that the hearsay statements could be considered to determine if there was a conspiracy. 107 S.Ct. at 2781. In rejecting exclusive reliance upon independent evidence, the Court rested upon Fed. R. Evid. 104(a), which states:

> Preliminary questions concerning . . . the existence of a privilege, or the admissibility of evidence shall be determined by the court. . . . In making its determination it is not bound by the rules of evidence *except those with respect to privileges.*

(emphasis added); *see also* Fed. R. Evid. 1101(c) ("the rule with respect to privileges applies at all stages of all actions, cases, and proceedings"); Rule 1101(d). Thus, unlike in *Bourjaily*, the court may not "consider[ ] any evidence it wishes, unhindered by considerations of admissibility." 107 S.Ct. at 2780. Indeed,

20 The government's independent evidence of the alleged illegality focused on the attorney-client communications themselves. The point of the panel decision below, however, is that the independent evidence proffered by the government failed to make out even a *prima facie* showing of an intended crime or fraud, *i.e.*, the first part of the test.

21 Indeed, the *en banc* dissent reviewed the communications themselves and agreed that the district court did not abuse its discretion in finding no *prima facie* case of intended illegality. *Zolin*, 842 F.2d at 1139 (Pet. App. 9a).

the court explicitly stated that in considering admissibility, a court is "bound . . . by the rules of privilege." *Id.*[22]

Moreover, *Bourjaily* dealt with the admissibility of evidence at trial. The issue here is not whether certain evidence is admissible, but the wholly separate question whether the otherwise privileged attorney-client relationship should be reviewed by a court in the absence of independent evidence of wrongdoing. The harm to the attorney-client privilege results from its revelation to anyone outside the confidential communication, not merely a determination that the evidence is admissible at trial. No such issue arises with mere hearsay evidence, which is commonly reviewed in various pre-trial proceedings. The government's attempt, in the face of Rule 104(a), to extend *Bourjaily* into the privilege realm must be rejected.

II.

THE DISTRICT COURT ACTED WELL WITHIN ITS AUTHORITY IN ISSUING A PROTECTIVE ORDER PROHIBITING THE IRS FROM MAKING DISCLOSURES OF THE SUMMONED INFORMATION WHICH WOULD HAVE VIOLATED § 6103 AND WHICH WOULD NOT HAVE BEEN IN FURTHERANCE OF ITS TAX INVESTIGATION

The government urges the extreme view that courts have no authority to issue protective orders preventing the IRS from illegally disclosing summoned information, even in cases, as here, where the prohibited disclosures are wholly unrelated to furthering the IRS's investigation of the taxpayer. To place the extraordinary breadth of this position in perspective, it is necessary to review briefly the proceedings in the district court.

The Church challenged the IRS's good faith in issuing the summons on the ground that the IRS was acting as an information-gathering agency for the Department of Justice

22 The Court specifically declined to decide whether the conspiracy showing could be made *exclusively* by hearsay statements, unsupported by corroborative independent evidence. 107 S.Ct. at 2781-82.

and was not conducting a good faith tax investigation. At the time the IRS issued the summons, the Church was involved in several lawsuits against the government, including two civil rights actions, the *Founding Church* case in Washington D.C. and the *Linberg* case in Los Angeles. In opposing enforcement of the summons, it introduced evidence that the IRS agents responsible for issuing the summons in this case had been closely collaborating with Department of Justice attorneys representing the government in the *Founding Church* and *Linberg* actions. The Justice Department attorneys were looking to the IRS for discovery helpful in defending the civil actions. The evidence showed, among other things, that the IRS agents had already violated 26 U.S.C. § 6103(a) by disclosing to the Justice Department attorneys the fact that the IRS was investigating Mr. Hubbard. It also persuasively suggested that the IRS agents and the government attorneys in the *Founding Church* case were cooperating in efforts to obtain the documents which are the subject of this summons enforcement proceeding. There is no question, moreover, but that IRS's disclosure of the summoned records to the Justice Department attorneys would have violated § 6103(a). There is no exception among the numerous exceptions set forth in subsections 6103(c) to (o) for disclosures to government attorneys for use in non-tax civil litigation.

Following a brief evidentiary hearing, the district court found that the IRS was pursuing a criminal investigation in good faith and accordingly enforced the summons. At the same time, however, it took cognizance of the Church's evidence by issuing a protective order designed to ensure that the IRS would not violate § 6103(a) by disclosing the summoned information to the Justice Department attorneys. As the district court explained:

> I should make it clear that this order is in a sui generis case. The I.R.S. and the United States [sic] [the Church are] in general carrying on litigation with each other in innumerable places and courts. And it looks like it isn't going to abate from what I have seen. . . .
>
> If you didn't have these various levels of litigation between the Government on the one hand and the Church

> on the other, then where there is fear that information acquired for one purpose may be in effect used for civil discovery in the other, I wouldn't think it necessary to make such an order. But this case is, therefore, not the typical case where you would routinely expect this kind of provision.

(J.A. 67). At the same time, the court made abundantly clear that it would permit disclosure of any information which may properly be disclosed under § 6103 (J.A. 60, 66, 68).

In this Court the government has urged the broad principle that in enforcing a summons the court may never place any restrictions whatsoever on the disclosure of the summoned information. In the government's view, a district court has only two choices in a summons enforcement proceeding: It may either enforce the summons in *toto* or deny enforcement altogether. It may not, according to the government, enforce the summons and at the same time issue a protective order limiting improper disclosure of the very material summoned in any respect, even to prohibit illegal disclosures unrelated to the IRS's tax investigation.[23] This rigid all or nothing approach is inconsistent with the inherent power of the courts to prevent their process from being abused. It also unduly restricts the ability of the district courts to accommodate both the interests of the IRS in obtaining information relevant to an ongoing investigation, on the one hand, and the interests of a taxpayer in preventing the summoned information from being improperly disclosed.

A. The District Court Has Inherent Power To Prevent Information Obtained Through Invocation Of Its Process From Being Disclosed Improperly

The federal courts have long exercised the authority to issue protective orders in appropriate cases to prevent confidential

23 This is in contrast to the order sought by the taxpayer in *United States* v. *Barrett*, 837 F.2d 1341 (5th Cir. 1988) (*en banc*), *petition for cert. pending*, No. 87-1705, which would have prohibited the IRS from disclosing, as part of its investigation, information other than that obtained in the summons.

information obtained through invocation of their process from being improperly disclosed. This authority, which the government challenges here, rests upon the inherent power of the courts to ensure that their process is not abused and derives from the very nature of Article III courts. It is thus an essential aspect of the independence of the judiciary under the separation of powers.

As with all administrative agencies, the IRS is without authority to compel through its own process the production of witnesses and papers. *ICC* v. *Brimson*, 154 U.S. 447, 485 (1894), established that the decision to enforce an administrative subpoena is judicial in nature, and since then Congress has acquiesced in the Court's judgment. *See, e.g.*, *SEC* v. *Wheeling-Pittsburgh Steel Corp.*, 648 F.2d 118, 123-24 (3rd Cir. 1981) (*en banc*); *United States* v. *Friedman*, 532 F.2d 928, 936-37 (3rd Cir. 1976). Thus, in order to obtain enforcement of a summons, the IRS must, as it did here, institute an action in a district court under 26 U.S.C. § 7604(a) or 7402(b). *See, e.g.*, *Reisman* v. *Caplin*, 375 U.S. 440, 445-46 (1964).

Once having invoked the powers of a district court, however, the IRS, like all other litigants, is subject to the court's inherent power to prevent abuses of its process. "[T]he equitable powers of the courts of the United States, sitting as courts of law, over their own process, to prevent abuse, oppression, and injustice, are inherent, and as extensive and efficient as may be required by the necessity for their exercise." *Gumbel* v. *Pitkin*, 124 U.S. 131, 145-46 (1888). Section 7604(a) in no way attempts to circumscribe this power; indeed, it expressly provides that the district courts "have jurisdiction *by appropriate process* to compel . . . attendance, testimony, or production of books, papers, records, or other data" (emphasis added).[24] This Court's decisions, likewise, repeatedly affirm that the courts remain fully possessed of their inherent power to prevent abuses of their process in IRS summons enforcement proceedings.

In its seminal decision in *United States* v. *Powell*, 379 U.S. 48, 58 (1964), this Court established the standards applicable in

24 The wording of § 7402(b) is virtually identical.

IRS summons enforcement proceedings and, in so doing, expressly instructed the courts to be vigilant in their prevention of agency abuses of their process: "It is the court's process which is invoked to enforce the administrative summons and a court may not permit its process to be abused." *Id.* An abuse of process would occur, the Court held, where the summons was issued for an improper purpose, "such as to harass the taxpayer or to put pressure on him to settle a collateral dispute, or for any other purpose reflecting on the good faith of the particular investigation." *Id.* Subsequently, in *United States* v. *LaSalle National Bank*, 437 U.S. 298 (1978), the Court elaborated that once the IRS recommends to the Department of Justice that a criminal prosecution be undertaken or abandons in an institutional sense any investigation of a taxpayer's civil tax liability, enforcement of an IRS summons would constitute an abuse of the court's process. *Id.* at 317-18. Additionally, it held that the courts may not permit the IRS to act as an information-gathering agency for other departments of the government. *Id.* at 317. At the same time, moreover, it expressly disclaimed any notion that the examples of conduct constituting an abuse of process set forth in *Powell*, as amended in *LaSalle*, were intended to be exclusive. *Id.* at 317-18 n.19 and n.20. "Future cases may will reveal the need to prevent other forms of agency abuse of congressional authority and judicial process." *Id.* at 318 n.20.

In accordance with *Powell* and *LaSalle*, the lower federal courts have prohibited a variety of other abuses of their process in IRS summons enforcement cases. *See, e.g., United States* v. *Beacon Federal Savings & Loan*, 718 F.2d 49, 53-54 (2d Cir. 1983) (to avoid abuse of court's process, summons resulting from information obtained from Fourth Amendment violations should not be enforced in certain circumstances); *United States* v. *Friedman*, 532 F.2d at 937-38 (to prevent abuse of court's process, court may where appropriate condition enforcement of summons on government reimbursement of reasonable costs of producing summoned materials). In *Friedman*, the Court held that § 7604(a) in no way purports to limit the power of the court to exercise its inherent authority to choose an appropriate rule

of decision in an enforcement proceeding: "We conclude from the very fact that enforcement of a § 7602 summons is by § 7604(b) [sic] entrusted to the judiciary, this court has the power to fashion appropriate rules as to the fairness of the enforcement order." *Id.* at 937.[25]

Furthermore, as the district court did below, the courts have traditionally exercised their inherent power to restrict improper uses of information obtained through invocation of their process. Civil discovery provides perhaps the most obvious example. The federal and state courts routinely issue protective orders to ensure the confidentiality of discovered information.[26] Only a few terms ago, this Court rejected a First Amendment challenge to the issuance of a protective order prohibiting the use of information obtained in discovery for any purpose other than to prepare for and try the case. *Seattle Times Co.* v. *Rhinehart*, 467 U.S. 20, 34-37 (1984). The Seattle Times had obtained information about the financial affairs of the plaintiff, a religious group, through an order compelling discovery and had intended to publish and disseminate the information as news. Relying on *Gumbel* v. *Pitkin*, *supra*, and the inherent power of courts to prevent abuses of their process, the Court held that the invasion of privacy which results from the publication of confidential information produced pursuant to court order is an abuse of the court's process and, on this basis, upheld the protective order. *Id.* at 35-36, *citing*, *International Products Corp.* v. *Koons*, 325 F.2d 403, 407-08 (2d Cir. 1963) (Friendly,

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25 Drawing from *Powell* and *LaSalle*, the lower courts have also prohibited abuses of their process in a wide variety of circumstances in subpoena enforcement actions instituted by other government agencies. *See, e.g., SEC* v. *Wheeling-Pittsburgh Steel Corp.*, 648 F.2d 118, 126-30 (3d Cir. 1981) (*en banc*); *SEC* v. *ESM Government Securities, Inc.*, 645 F.2d 310, 314-18 (5th Cir. 1981).

26 *See, e.g., The Courier Journal* v. *Marshall*, 828 F.2d 361, 364-67 (6th Cir. 1987); *In re Alexander Grant & Co. Litigation*, 820 F.2d 352, 355-56 (11th Cir. 1987); *Cipollone* v. *Liggett Group, Inc.*, 785 F.2d 1108, 1118-23 (3rd Cir. 1986), *cert. denied*, 108 S.Ct. 487 (1987); *Covey Oil Co.* v. *Continental Oil Co.*, 340 F.2d 993, 999 (10th Cir.), *cert. denied*, 380 U.S. 964 (1965).

J.).[27] *See also Laxalt* v. *McClatchy*, 809 F.2d 885, 889-90 (D.C. Cir. 1987) (courts traditionally issue protective orders to prevent confidential information subpoenaed under Fed.R.Civ.P. 45 from being disclosed, especially where, as here, a statute protects the confidentiality of the information); *Friedman* v. *Bache Halsey Stuart Shields, Inc.*, 738 F.2d 1336, 1343-44 (D.C. Cir. 1984) (same).

Even closer in point, this Court has previously made clear that the courts stand as a barrier to the improper disclosure of confidential information subpoenaed by administrative agencies. In *FCC* v. *Schreiber*, 381 U.S. 279, 295-98 (1965), the Court held that if the Commission decides to disclose subpoenaed information which the producer believes should be accorded confidentiality, judicial protection is available prior to the disclosure. *Id.* at 296, *citing Reisman* v. *Caplin*, 375 U.S. 440 (1964). Because the Commission in that case had not yet denied confidentiality to the bulk of the subpoenaed records, the Court concluded issuance of a protective order was premature and would usurp the agency's discretion to decide whether to accord the records confidential treatment in the first instance. It, nonetheless, left no doubt that judicial protection would be available to protect "against improvident disclosure[s]" by the Commission. 381 U.S. at 297-98. Indeed, as to a small portion of the subpoenaed materials which the agency had already declined to accord confidentiality, the Court reviewed the Commission's decision but found that it was proper on the merits. *Id.* at 298-99.

Likewise, the lower courts have long recognized their discretion to issue protective orders when enforcing administrative

27 Protective orders are authorized by Rule 26(c) of the Federal Rules of Civil Procedure for good cause shown. This Court has repeatedly held that the Federal Rules are applicable to IRS summons enforcement proceedings. *See Upjohn Co.* v. *United States*, 449 U.S. 383, 398-99 (1981); *Donaldson* v. *United States*, 400 U.S. 517, 528-29 (1971); *Powell*, 379 U.S. at 58 n.18. Fed.R.Civ.P. 81(a)(3) expressly provides that "[t]hese rules apply to proceedings to compel the giving of testimony or production of documents in accordance with a subpoena issued by an officer or agency of the United States under any statute of the United States except as otherwise provided by statute or by rules of the district court or by order of the court in the proceedings."

subpoenas. In *FTC* v. *Lonning*, 539 F.2d 202, 210-11 (D.C. Cir. 1976), for instance, the court reaffirmed the authority of the district courts to ensure the confidentiality of trade secrets by requiring "appropriate protection as a precondition to enforcement of FTC subpoenas." *Id.* at 211, and cases cited therein. Noting the similarity of protective orders in this context to those issued to protect confidential information in discovery under the Federal Rules of Civil Procedure, *id.* at 211 n.17, the court further held that the "decision as to the type and scope of any protective order rests within the sound discretion of the trial judge and must be determined on a case by case basis." *Id.* at 211. The court concluded, however, that a protective order was unnecessary in that case because the Commission had already sufficiently insured the confidentiality of the information.[28]

These authorities amply demonstrate that the district court's long recognized inherent power fully authorized it to restrict the IRS from disclosing summoned information in violation of § 6103 to Justice Department lawyers involved in non-tax civil litigation with the Church, as the Church had demonstrated there was a substantial possibility it would it do. Indeed, as the court of appeals recognized, this case presented a peculiarly appropriate occasion for exercise of the court's authority. With evidence before it that the IRS intended to willfully violate a congressional enactment mandating that tax information be held confidential except in delineated circumstances not applicable here, the court was faced with a serious threatened

28 *See also Dow Chemical* v. *Allen*, 672 F.2d 1262, 1277-78 (7th Cir. 1982) (affirming the quashing of an FTC subpoena where district court had concluded that protective order "might not be fully effective"); *FTC* v. *Texaco, Inc.*, 555 F.2d 862, 883-85 (D.C. Cir.) (*en banc*) (imposing notice requirement on FTC before disclosing information producer designates as confidential so that there will "opportunity for judicial review . . . if producers believe that a particular proposed disclosure is improper"), *cert. denied*, 431 U.S. 974 (1977). The courts have reached the same result with regard to subpoenas issued by other administrative agencies. *See, e.g.*, *SEC* v. *Dresser Industries, Inc.*, 628 F.2d 1368, 1389 (D.C. Cir.) (*en banc*) (judicial review available to prevent release by SEC of confidential information), *cert. denied*, 449 U.S. 993 (1980).

abuse of its process by executive branch officials which could only be prevented by issuance of a protective order. Under circumstances such as these, judicial independence and our system of separation of powers requires that the government's narrow view of the court's authority be rejected.

B. This Court's Decisions In IRS Summons Cases Provide No Support For The Broad Limitations On The Inherent Power Of The Courts Urged By The Government

1. Section 6103 Is an Unambiguous Limitation on the IRS's Summons Power and, in any Event, the Restrictions Imposed by the District Court's Order Cannot by Definition Interfere with the Effective Performance of the IRS's Enforcement Responsibilities

In support of its position that the role of the courts is strictly limited to enforcing or denying enforcement of an IRS summons, the government relies heavily on statements of this Court that restrictions on the IRS's summons authority should be avoided in the absence of an unambiguous congressional direction. *See, e.g., United States* v. *Arthur Young & Co.*, 465 U.S. 805, 816 (1984); *United States* v. *Euge*, 444 U.S. 707, 711 (1980); *United States* v. *Bisceglia*, 420 U.S. 141, 150 (1975). Section 6103, however, is precisely such a congressional direction. It reflects a broad congressional judgment that information obtained by the IRS is confidential and should not be disclosed except in narrowly delineated circumstances provided for by statute. S.Rep. No. 94-938, 94th Cong., 2d Sess. 19, *reprinted in* 1976 U.S. Code Cong. & Ad. News 3439, 3455. It is thus a general limitation on the IRS which perforce applies to all of its activities, including its use of materials obtained through the summons power.[29]

29 Nor is it relevant, as the government contends, whether Congress intended to authorize an action for injunctive relief to restrain violations of § 6103. As is explained further, *infra* at 44, the district court's order was simply not an injunction. Rather, it was a protective order issued to prevent the IRS from abusing the court's process after it—not the taxpayer—sought the court's assistance, and there is absolutely no indication that Congress sought in § 6103 to limit the courts in the exercise of their inherent power. Likewise, since the order was not an injunction, the Tax Anti-Injunction Act, 26 U.S.C. § 7421(a), has no application here.

The presumption against imposing restrictions on the IRS's summons power is inapposite for another reason. As the Court's decisions readily reveal, the underlying concern of the presumption is that the IRS have those powers necessary to the effective enforcement of the tax laws. Indeed, the Court itself has expressly so explained on numerous occasions:

> "[T]his Court has consistently construed congressional intent to require that *if the summons authority claimed is necessary for the effective performance of congressionally imposed responsibilities to enforce the tax Code*, that authority should be upheld absent express statutory prohibition or substantial countervailing policies."

Arthur Young, 465 U.S. at 816, *quoting*, *Euge*, 444 U.S. at 711. (emphasis added).[30]

In this case, the reason for the district court's restriction on the IRS's disclosure of the summoned information is wholly unrelated to any tax investigation and, consequently, in no way impedes the IRS in "the effective performance of congressionally imposed responsibilities to enforce the tax Code." *Id.* In the district court, the Church submitted evidence to show that the IRS, in violation of § 6103, intended to disclose the summoned records to Department of Justice attorneys representing the government in civil lawsuits brought by the Church so that they might use the information in defending those actions. The

30 For this reason, these and the other decisions of this Court on which the government relies are unremarkable and irrelevant here. They are expressly based on the need to ensure that the IRS has the authority necessary to effectively enforce the tax laws. *See, e.g., Arthur Young*, 465 U.S. at 818-21 (declining to recognize in IRS sumons proceedings a work-product immunity for tax accrual papers prepared by a taxpayer's accountant); *Euge*, 444 U.S. 716-18 (ruling that the summons power extends to compelling handwriting exemplars); *Bisceglia*, 420 U.S. at 150 (recognizing even in the absence of express statutory authority the IRS's right to issue "John Doe" summonses); *Tiffany Fine Arts, Inc.* v. *United States*, 469 U.S. 310, 322-23 (1985) (permitting the IRS to avoid complying with the procedural requirements of the later enacted John Doe summons provisions, 26 U.S.C. § 7609(f), where the summoned records are relevant to an investigation of the tax liability of the summoned taxpayer even though they are also relevant to the lax liability of unnamed third parties).

purpose of the district court's order was thus to prohibit these imminent violations of § 6103 and could in no way interfere with the IRS's tax investigation. Whether the IRS disclosed the information to the Justice Department attorneys or not was entirely irrelevant to its investigatory interests, although in contrast, it was critical to the court's concern that its process not be abused.[31]

Indeed, in most instances IRS disclosures are apt to be unrelated to any tax investigation. A review of § 6103's exceptions to the non-disclosure rule reveals the wide variety of circumstances entirely unrelated to any tax investigation in which the

31 The district court specifically indicated, in fact, that its order would not affect "I.R.S. gathering other information" (J.A. 69), and that its purpose was to permit the IRS to use the summoned information "for the purpose of their tax investigation." *Id.* By its terms, the court's order applies only to disclosures to "any other government agency," (Pet. App. 29a), not to third parties. In the district court, the government had to strain to hypothesize any circumstance remotely related to the facts of this case in which this restriction could conceivably affect its investigation (J.A. 68-69).

To the extent the order additionally requires prior court approval for any disclosures, the district court's reasoning was clear. Without predisclosure review, it could not ensure that the IRS would in good faith comply with § 6103, a subject on which it had ample basis for harboring doubts. *Cf. In re Alexander Grant & Co. Litigation*, 820 F.2d 352, 356-57 (11th Cir. 1987) (approving use of "umbrella" protective orders under which any document designated confidential by producing party is deemed protected unless challenged and court orders otherwise); *Cipollone* v. *Liggett Group, Inc.*, 785 F.2d at 1121-22 (same). In addition to the evidence presented by the Church, the government asserted in open court its mistaken view that § 6103 does permit disclosure to aid the government in non-tax litigation; whereas, on the contrary, § 6103 strictly prohibits disclosure to aid non-tax *civil* litigation and only permits disclosures to aid criminal non-tax litigation in the circumstances specified in §§ 6103(i)(1) and (2). (*See* J.A. 50, where the government asserted incorrectly that where the "Federal Government is involved in litigation that is not involved in a tax matter, it can seek through a court order the IRS text [sic] or taxpayer return information.")

In any case, should this Court find the district court's order overbroad in any respect, a simple modification of the order, by this Court or on remand, would be sufficient to cure any technical defect. The protective order need only prohibit the IRS from disclosing the summoned information to Department of Justice attorneys representing the government in non-tax civil litigation with the Church.

IRS may disclose tax information.[32] This is not to suggest that the IRS never discloses tax information in furtherance of its tax investigations[33] or that a protective order prohibiting the IRS from making such disclosures might never impede its investigation. On the contrary, the point is that the government's emphatic argument that *any* power in the courts to prohibit disclosures, even disclosures unrelated to a tax investigation, would somehow interfere with the IRS's investigatory interests is misplaced. The government's broad brush approach simply cannot withstand scrutiny.

The government's concern is better suited to facts such as those presented in *United States* v. *Barrett*, *supra*, 837 F.2d 1341. In that case, the IRS, prior to issuing the summons at issue, had disclosed the fact that Dr. Barrett was under investigation for criminal tax fraud to some of his patients in order to obtain information about their financial transactions with him. Indicating that these disclosures were necessary to its investigation, the IRS stated that it would continue to disclose this information to patients whose names were revealed in the summoned records. In turn, Dr. Barrett argued that these disclosures were not authorized under § 6103(k)(6) and sought a protective order preventing the IRS from disclosing the information to his patients.

32 *See, e.g.*, § 6103(f) (disclosure to persons with material interest); § 6103(g) (disclosure to President or his designees under specified circumstances); 6103(i)(3)(B)(i) (disclosure to prevent death or physical injury); § 6103(i)(3)(B)(ii) (disclosure to warn of imminent flight from federal prosecution); § 6103(i)(5) (disclosure to locate fugitive); § 6103(l) (disclosure for a wide variety of non-tax related purposes to various federal, state and local government agencies).

33 *See, e.g.*, § 6103(k)(6) (permitting disclosure by an IRS official or employee "to the extent that such disclosure is *necessary* in obtaining information, which is not otherwise reasonably available, with respect to the correct determination of tax [liability]") (emphasis added). The legislative history of this exception indicates that it was intended to permit the IRS "in rare and extraordinary cases" to disclose return information to a "third party where it is necessary in order to obtain information not otherwise reasonably available." S.Rep. No. 94-938 at 342, *reprinted in* 1976 U.S. Code Cong. & Ad. News 3771.

Had the court issued such a protective order, it would clearly have been interfering in the IRS's investigation, albeit only to prevent illegal disclosures, thus raising the question briefed by the government here. The government's bootstrapping of the *Barrett* issue into this case, however, cannot justify the broad restriction on the district court's inherent power which the government urges. As framed by the government, the question presented to this Court is whether "in the course of an action brought by the Internal Revenue Service to enforce a summons, the court may place restrictions on the disclosure of the summoned information." Thus, irrespective of whether a court may restrict IRS disclosures in a manner which would impinge on the IRS's conduct of its investigation by illegal means, the question here is whether any restriction, including one completely unrelated to its investigation, is ever permissible.[34]

Similarly, the government's concern that the availability of protective orders may cause delays and unduly burden summons enforcement proceedings is equally uncompelling. As a practical matter, additional delay is unlikely to occur. In opposing enforcement of a summons, a taxpayer ordinarily can be expected to submit all available evidence to demonstrate that the IRS's investigation is in bad faith, including evidence of prior and/or intended unlawful disclosures of return information. Thus, the evidence submitted in support of both remedies will usually be the same. *See Barrett*, 837 F.2d at 1356-57 (Brown, J., concurring in part and dissenting in part). Indeed, this case is instructive. The Church put forward its evidence of

34 Thus, the Tax Anti-Injunction Act, 26 U.S.C. § 7421(a), under any view, is inapplicable here, notwithstanding the issues discussed *infra* of whether it applies to protective orders at all. As construed in the cases cited in the government's brief, the Act prohibits the issuance of an injunction restraining the IRS from making any use of information which it colorably claims is in furtherance of a tax investigation. It is arguable, therefore, that the Act prevents issuance of an injunction in cases where the IRS claims that its intended disclosures are in furtherance of its tax investigation. Such an injunction might impede its investigation and thereby indirectly its "assessment or collection" of taxes. § 7421(a). It clearly has no application, however, to cases where, as here, the protective order, even if considered an injunction, is directed at disclosures wholly unrelated to any IRS tax investigation and thus cannot restrain the assessment or collection of any tax.

bad faith at a brief evidentiary hearing held expeditiously after the filing of the petition. The same evidence submitted to establish bad faith also went to the need for a protective order, and thereafter the court issued its protective order at the same time that it enforced the summons. The Church instituted no other proceedings and caused no further delay.

Furthermore, the lower courts have adopted strict procedures designed to ferret out unmeritorious taxpayer claims expeditiously, taking to heart this Court's admonition in *LaSalle* that the taxpayer's "burden is a heavy one." 437 U.S. at 316. While there are some minor variations in practice among the circuits, the following generalizations may be made: The courts impose only a light burden on the IRS to establish a *prima facie* case under *Powell* through the submission of affidavits. In contrast, the taxpayer is ordinarily entitled, at most, to highly restricted discovery and, in many cases, to no discovery at all. He nevertheless must refute the IRS's *prima facie* case with specific factual allegations to be entitled even to a limited evidentiary hearing. The hearing is ordinarily brief, allowing the taxpayer to cross-examine only the agent who issued the summons. Only if at the hearing the taxpayer creates a substantial doubt as to the good faith of the investigation is he entitled to somewhat fuller discovery. Moreover, courts have set strict time limits for the petition, answer, discovery, and any evidentiary hearings. *Compare United States* v. *Kis*, 658 F.2d 526, 536-42 (7th Cir. 1981), *cert. denied*, 455 U.S. 1018 (1982), and *United States* v. *Garden State National Bank*, 607 F.2d 61, 70-71 (3rd Cir. 1979) *with United States* v. *Harris*, 628 F.2d 875, 879-83 (5th Cir. 1980).

In light of these strict procedures, it is difficult to see how a taxpayer can significantly delay enforcement by making an unmeritorious request for a protective order. The district courts, armed with summary procedures, can handle this problem in the proper exercise of their discretion. To the extent, moreover, that a taxpayer raises substantial questions about the IRS's intentions, the court must act to prevent its process from

being abused. *Powell*, 379 U.S. at 58. Some additional delays, where necessary, are warranted in such cases.[35]

2. *LaSalle* and *Tiffany Fine Arts* Implicitly Approve the Issuance of Protective Orders to Prevent Improper Disclosures of Summoned Information

The government further argues that the decisions of this Court in *LaSalle*, 437 U.S. 298, and *Tiffany Fine Arts*, 469 U.S. 310, implicitly reject any role for the district courts beyond enforcing or denying enforcement of a summons. It places particular reliance on the Court's opinion in *LaSalle*, arguing that in balancing the various interests in that case, the Court did not regard issuance of a protective order "as a viable option." (Gov't Br. at 23). In our view, however, *LaSalle* is directly to the contrary.

LaSalle turned upon the fact that the civil and criminal investigatory and enforcement elements of the Internal Revenue Code "are inherently intertwined," 437 U.S. at 309, and that therefore in the context relevant to *LaSalle*, "it is unrealistic to attempt to build a partial information barrier between" the IRS and the Justice Department. *Id.* at 312. Accordingly, the Court held that once there has been a criminal tax referral to the Justice Department, the more severe prophylactic measure of prohibiting the IRS from using its summons power altogether is required. The Court so ruled despite the fact that "[t]he government does not sacrifice its interest in unpaid taxes just because a criminal prosecution begins." *Id.* at 311-12.

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35 Finally, judicial economy considerations more than balance any residual concern about delay. A post-disclosure civil suit under § 7431, necessitated by denial of a protective order, would require litigation not only of the same § 6103 issues which could have been decided by the district court in advance, but of additional issues such as damages and the good faith of the agent committing the violation. The result would be more time-consuming and distracting litigation and the expenditure of even more valuable judicial resources. *See United States* v. *Barrett*, 804 F.2d 1376, 1381 (5th Cir. 1986), *rev'd en banc*, 837 F.2d 1341 (5th Cir. 1988), *petition for cert. pending*, No. 87-1705 (Brown, J., concurring).

In contrast to *LaSalle*, it was neither unrealistic nor impractical for the district court in this case to prevent the IRS from disclosing the summoned records to Justice Department attorneys for use in defending non-tax civil litigation brought by the Church. Under Congress' tax scheme, there is no role for the sharing of information between the IRS and attorneys at the Justice Department involved in non-tax civil litigation. Indeed, the imposition of this kind of information barrier is precisely what Congress intended in enacting § 6103. Contrary to the government's assertion, therefore, *LaSalle* at a minimum implicitly suggests that the courts have the authority under § 7604(a) to restrict the IRS from making improper disclosures of summoned information.

In this case, the government's all or nothing approach would force the court to make an unnecessarily stark choice: it could, as in *LaSalle*, deny enforcement as a prophylactic measure despite the IRS's legitimate interest in unpaid taxes, or it could enforce the summons despite the abuse of its process and the violation of congressional policy which would result. Some lower courts, without considering the possibility of issuing protective orders, have suggested that denial of enforcement altogether is appropriate under these circumstances. For instance, in *United States* v. *Scholbe*, 664 F.2d 1163, 1167-68 (10th Cir. 1981), the Court held that the IRS "will retain its power to issue subpoenas" only if it "confines its sharing to the limits of I.R.C. § 6103." *Id.* at 1168. *United States* v. *Chemical Bank*, 593 F.2d 451, 455-58 (2d Cir. 1979), although relied upon by the government, is to the same effect. The court only enforced the summons in that case because the taxpayer had failed to submit any evidence indicating that the IRS intended to violate its own internal guidelines against improper disclosures, noting that it would "not anticipate that the Government will act unlawfully." *Id.* at 455. *See also United States* v. *Davis*, 636 F.2d 1028, 1036 n.7 (5th Cir. 1981) (noting enforcement was proper because no evidence presented that IRS had transmitted information to the DEA in violation of § 6103); *cf. United States* v. *Balanced Financial Management, Inc.*, 769 F.2d 1440, 1448 (10th Cir. 1985) (implying that sufficient past violations of

§ 6103, even in the absence of showing of intended future violations, may be "such an abuse as to invalidate the entire enforcement proceeding"). *But see United States* v. *Stuckey*, 646 F.2d 1369, 1375-76 (9th Cir. 1981) (indicating, although concurring and dissenting judges both disagreed on this point, that court would have enforced summons even if IRS had indicated it would disclose information without complying with § 6103 because it also had legitimate civil tax investigation purpose), *cert. denied*, 455 U.S. 942 (1982).

The government's point, on closer examination, is not that a court should either enforce or deny enforcement of a summons. Rather, it is that a summons should be enforced even if there is reason to believe that the IRS will disclose the summoned information in violation of § 6103 and even if the intended disclosure is unrelated to its investigation. There is no reason, however, for sacrificing either the taxpayer's congressionally protected interest in confidentiality or the government's interest in unpaid taxes. The simple expedient of a protective order can fully accommodate these otherwise conflicting interests.[36]

The government also misinterprets this Court's decision in *Tiffany Fine Arts, Inc.* v. *United States*, 469 U.S. 310 (1985). In that case, the IRS issued a "dual purpose summons" seeking information relevant to its investigation of the summoned party's tax liability as well as to its investigation of the tax liabilities of unnamed third parties. Both purposes, of course, were perfectly lawful. Had any of the information summoned been relevant only to the tax liabilities of the unnamed third parties, however, the IRS would have been required to comply with the "John Doe" provisions of the Code, § 7609(f), which require it to obtain an *ex parte* court order before issuing such a summons. *Id.* at 322-23. The Court found that since all of the summoned information was relevant to the investigation of the summoned party, the IRS could properly seek that information from it without complying with § 7609(f) as well. *Id.* Underlying its decision is the notion that the IRS may use any information which it has lawfully obtained in one investigation for any other *proper* purpose, such as, in *Tiffany*, determining the tax liabilities of third parties.

36 Indeed, in this case the district court held that it could issue a protective order, and that therefore the summons should be enforced even in the face of evidence that the IRS would improperly disclose summoned information. If this Court determines that the district court had no authority to issue an order protecting the interests of both the government and the taxpayer, then the case should be remanded to the district court so that it may consider whether enforcement of the summons should be denied.

The instant case, in contrast to *Tiffany*, is more properly characterized as a mixed *motive* case, where the district court had before it evidence of both legal and illegal motives. Contrary to the government's assertion, therefore, *Tiffany* in no way suggests that where the IRS summons information for both legitimate and *unlawful* purposes, the Court has no authority to issue a protective order prohibiting the IRS from carrying out its unlawful intent. The ability of the courts to prevent their process from being abused requires no less.

C. The Congressional Policy Against Disclosure Of Return Information Expressed In § 6103 Supports Rather Than Detracts From The Inherent Authority Of Courts To Prevent Improper Disclosures By Issuing Protective Orders

The enactment of § 6103 as part of the Tax Reform Act of 1976, Pub. L. No. 94-455, 90 Stat. 1520, reflected a broad congressional judgment against the unrestrained disclosure of information obtained by the IRS in enforcing the tax Code. Under the prior law, which permitted disclosure under regulations approved by the President or by Presidential order, Congress found that there had been "serious abuses of the rights of taxpayers," S.Rep. No. 94-938, 94th Cong. 2d Sess. 345, *reprinted in* 1976 U.S. Code Cong. & Ad. News 3439, 3775, including the delivery of tax returns to the White House in an attempt "to use the Internal Revenue Service for political purposes." 122 Cong. Rec. 24013 (1976) (Remarks of Senator Dole); *see also* S. Rep. No. 94-938 at 317, 1976 U.S. Code Cong. & Ad. News 3746. Congress therefore acted "to strengthen taxpayers rights," S.Rep. No. 94-938 at 3, 1976 U.S. Code Cong. & Ad. News 3440, by providing rules relating to the confidentiality of tax returns, "an area where there has been

much abuse in the past." *Id.* at 19, 1976 U.S. Code Cong. & Ad. News 3455. *See also Barrett*, 837 F.2d at 1353-56 (Brown, J., dissenting); *Stokwitz* v. *United States*, 831 F.2d 893, 894-95 (9th Cir. 1987), *cert. denied*, 108 S.Ct. 1592 (1988); *Tierney* v. *Schweiker*, 718 F.2d 449, 455 (D.C. Cir. 1983).

The government concludes from the fact that Congress provided criminal penalties, § 7213(a), and a civil damages remedy, § 7431, for violations of § 6103 that Congress did not intend there to be general predisclosure injunctive relief for threatened violations of § 6103. From this it leaps to the conclusion that Congress intended to prohibit the courts from issuing protective orders in summons enforcement actions.

Although we disagree with the government's premise that predisclosure relief is unavailable, *see infra*, even if true, it is entirely irrelevant. A protective order, as issued by the court below, is not an injunction. Injunctive relief is granted in favor of the party invoking the court's process and only in accordance with the special requirements of Rule 65 of the Federal Rules of Civil Procedure. A protective order, in contrast, is issued against the very party seeking the court's aid. It is collateral to the main proceeding and is issued to prevent the court's process from being abused by a party obtaining relief. Whether issued pursuant to Rule 26(c) or the inherent power of the court, it is not subject to Rule 65, is not appealable under 28 U.S.C. § 1292(a)(1) as an injunction, and is not "an 'injunction' in the sense used in the federal statutes and rules." *International Products Corporation* v. *Koons*, 325 F.2d 403, 406 & n.3 (2d Cir. 1963) (Friendly, J.); *see also Bridge C.A.T. Scan Associates* v. *Technicare Corp.*, 710 F.2d 940, 943-44 (2d Cir. 1983). Accordingly, the question of whether or not Congress intended to authorize plenary actions for injunctive relief under § 6103 is simply irrelevant to the question of whether the federal courts retain their power to issue protective orders to prevent abuses of their process in summons enforcement actions.

Nor can the Court conclude that Congress intended to prohibit the issuance of protective orders in summons enforcement

proceedings from the fact that § 6103 is silent on this subject. Section 6103 does not purport to deal with the question of summons enforcement at all; it merely sets forth substantive rules governing when the IRS may or may not disclose taxpayer information. Its failure to address itself to the wholly separate question of the power of district courts to prevent abuses of their process in summons enforcement actions can hardly be deemed to be a congressional decision to limit the federal courts in the exercise of such a fundamental and inherent power. It would be extraordinary indeed had Congress intended to oust the courts of this power without any express indication of its intent. It must be presumed that when Congress legislates it is aware of the traditional inherent power of the courts and, in the absence of a clear direction to the contrary, intends to leave it intact. Here, moreover, the issuance of protective orders clearly supports rather than detracts from the legislative purpose.

The government's reliance on the Tax Anti-Injunction Act, 26 U.S.C. § 7421(a), is equally unavailing. As construed in the cases cited by the government, it prohibits taxpayers from maintaining affirmative suits for injunctive relief which interfere with ongoing IRS investigations. Since a protective order is not an injunction "in the sense used in the federal statues and rules," *Koons* at 406 n.3, nothing in the Act renders the courts powerless to issue protective orders to prevent their process from being used to further illegal activity.[37]

Furthermore, although it is unnecessary—and probably inappropriate—to resolve the issue here, we believe Congress did intend to provide for predisclosure relief to prevent violations of § 6103. There is no question that injunctive relief

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37 The government perceives an anomaly in placing taxpayers who challenge a summons in a preferred position to taxpayers who comply in the first instance with a summons or voluntarily produce records. Again, we disagree with the government's underlying premise, but even so assuming, we fail to see the anomaly. In a summons enforcement proceeding the IRS invokes the court's process in support of its investigation. The court must ensure therefore that its process is not abused. *Powell*, 379 U.S. at 58. It makes no difference that there may be other deserving parties not before the court who have not been afforded a remedy for the same wrong.

would further Congress' intent to prevent improper disclosures. Certainly, nothing in the sparse legislative history on this point suggests that predisclosure relief was not to be made available. The Senate Report indicated that the existing enforcement procedures were inadequate and that criminal penalties should be broadened and substantially stiffened. S.Rep. No. 94-938 at 347, 1976 U.S. Code Cong. & Ad. News 3777. It noted further that a civil damages remedy was being added "to aid in the enforcement of the confidentiality rules." *Id.* It did not indicate, however, that the damages remedy was intended to be exclusive.

Where Congress intended to provide exclusive remedies under the Tax Reform Act, it did so explicitly. Thus, section § 6110, enacted at the same time as § 6103, authorizes a taxpayer to file a predisclosure suit in the Tax Court, § 6110(f)(3), or a damages suit in the Court of Claims, § 6110(i), but further explicitly provides that such remedies shall be exclusive. § 6110(i) and (1). In contrast, § 6103, 7213(a) and 7431, although enacted at the same time, provide no indication that the post-disclosure criminal penalties and civil damages remedy are exclusive. We agree with the government that these provisions and § 6110 should be read *in pari materia*. Congress clearly knew how to indicate in unequivocal language that it intended to limit the availability of remedies not specified in these provisions. Its failure to do so in § 6103 therefore is a telling indication that it assumed other remedies, especially equitable remedies ordinarily within the inherent powers of the courts, would be available. *Cf. Califano* v. *Yamasaki*, 442 U.S. 682, 705 (1979); *Porter* v. *Warner Holding Co.*, 328 U.S. 395, 398 (1946).[38]

38 If predisclosure relief is unavailable, then Congress left a significant gap in the enforcement of § 6103. Under § 7213(a), only willfull violations of § 6103 can result in criminal liability, and under § 7431(a), only knowing or negligent violations can result in civil liability. Thus, disclosures based on a good faith but erroneous interpretation of the law would be unrestrained, and without remedy, even where the taxpayer knows of the disclosure in advance. *See* § 7431(b) (expressly excepting such disclosures from civil liability). Given Congress' emphatic concern to protect the confidentiality of tax information, it seems highly doubtful that it intended this result.

The lower federal courts have so concluded in the few cases where predisclosure challenges were actually instituted. *See Tierney* v. *Schweiker*, 718 F.2d 449, 456-57 (D.C. Cir. 1983) (finding damages remedy inadequate and awarding predisclosure relief to Supplemental Security Income recipients to prevent IRS disclosures pursuant to consents coerced by the Social Security Administration); *Kemlon Products & Development Co.* v. *United States*, 638 F.2d 1315, 1321-23 (5th Cir. 1981) (declining to issue injunction against disclosures in furtherance of tax investigation because of Tax Anti-Injunction Act but implicitly indicating that injunctive relief would be available where, as here, the Act is inapplicable), *cert. denied*, 454 U.S. 863 (1981).

Injunctive relief is available, in any event, under the Administrative Procedure Act ("APA"), 5 U.S.C. §§ 701-706, which provides for predisclosure judicial review of agency decisions to disclose information. *Chrysler Corp.* v. *Brown*, 441 U.S. 281, 317-18 (1979). In *Brown*, the agency notified Chrysler that it intended to disclose certain information, which Chrysler in turn claimed was confidential and protected by, *inter alia*, the Trade Secrets Act, 18 U.S.C. § 1905. The Court held that although no private right of action for injunctive relief could be implied under § 1905, *id.* at 316-317, judicial review was available under § 702 of the APA. *Id.* at 317-18.

There is no reason for a different result simply because the disclosing agency is the IRS. Although there is an exception to the APA where "statutes preclude judicial review," § 701(a)(1), there is a strong presumption in favor of judicial review which may be rebutted only upon a showing of clear and convincing evidence of a contrary legislative intent. *See, e.g., Traynor* v. *Turnage*, 108 S.Ct. 1372, 1378 (1988); *Bowen* v. *Michigan Academy of Family Physicians*, 476 U.S. 667, 670-73 (1986); *Dunlop* v. *Bachowski*, 421 U.S. 560, 567 (1975); *Abbott Laboratories* v. *Gardner*, 387 U.S. 136, 140-41 (1967). No such showing has been made here.[39] On the contrary, the availability

39 The Tax Anti-Injunction Act, 26 U.S.C. § 7421(a), does not preclude judicial review here. As previously noted, whatever its outer bounda-

of judicial review can only further Congress' purpose to prevent the invasion of privacy and damage to the voluntary tax system which results from improper disclosures of tax information.

Nor does § 704 of the APA, which limits judicial review under the APA to "final agency action for which there is no other adequate remedy in a court," apply here. In order to prevent this language from defeating the central purpose of the APA to provide a broad spectrum of review of agency actions, this court narrowly construed § 704 only last term in *Bowen* v. *Massachusetts*, 108 S.Ct. 2722, 2736-37 (1988). In accordance with the provision's legislative history, the Court concluded that it was meant to preclude only " 'additional judicial remedies in situations where the Congress has provided special and adequate review procedures.' " *Id.* at 2736, *quoting*, Attorney General's Manual on the Administrative Procedure Act 101 (1947). At the time the APA was enacted, the Court explained, these kinds of special procedures existed for agencies such as the Federal Trade Commission and the National Labor Relations Board whose orders were directly appealable to the courts of appeal. In enacting the APA, Congress did not intend its "general grant of jurisdiction to duplicate the previously established special statutory procedures relating to specific agencies." 108 S.Ct. at 2737. Since these kinds of special procedures are clearly not applicable to review of IRS disclosure decisions, § 704 imposes no impediment to judicial review. *See also Commonwealth of Massachusetts* v. *Departmental Grant Appeals Board*, 815 F.2d 778, 784 (1st Cir. 1987); K. Davis, *Administrative Law Treatise*, § 26:11-26:12 (2d ed. 1983).

Thus, although we do not believe it is necessary for the Court to reach this issue, we nonetheless urge that predisclosure equitable relief to prevent violations of § 6103 should be available and that in any event judicial review of IRS disclosure decisions is available under the APA.

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ries may be, it is clearly inapplicable where the disclosure decision being reviewed is not a part of any IRS tax investigation. A decision that such a disclosure was not in accordance with law could in no way restrain the assessment or collection of taxes. *See* n.34, *supra*.

D. The Only Question Before This Court Is Whether The District Court Had Authority To Impose Any Limitations On The IRS's Disclosure Of The Summoned Information, Even Disclosures Unrelated To Its Investigation And In Violation of § 6103

The question on which the government sought and obtained *certiorari* in this case is whether a federal court has any authority whatsoever to issue a protective order against improper disclosures of the very records sought in a summons enforcement proceeding. If the Court finds that federal courts do have such power, at least to protect against disclosures concededly unrelated to legitimate tax investigations and in violation of § 6103, it need review the case no further. Either the court of appeals judgment should be affirmed, or the case should be remanded to the court of appeals for consideration of whether the district court's order properly conforms to the scope of its power as defined by this Court. The court of appeals may then consider whether technical modifications of the district court's order are required to specify that the IRS is restricted from disclosing the summoned records to Department of Justice attorneys representing the government in non-tax civil litigation with the Church.

CONCLUSION

For the reasons stated herein, respondents respectfully request that the judgment below be affirmed.

Respectfully submitted,

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Dated: February 1, 1989

Supreme Court, U.S.
FILED
MAR 3 1989
JOSEPH F. SPANIOL, JR.
CLERK

No. 88-40

In the Supreme Court of the United States

OCTOBER TERM, 1988

UNITED STATES OF AMERICA, PETITIONER

v.

FRANK S. ZOLIN, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

REPLY BRIEF FOR THE UNITED STATES

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Founding Church of Scientology v. *Webster*, complaint dismissed, No. 98-0107 (D.D.C. Apr. 9, 1985), aff'd, 802 F.2d 1448 (D.C. Cir. 1986), cert. denied, 108 S. Ct. 199 (1987)	14
Gumbel v. *Pitkin*, 124 U.S. 131 (1888)	4
Kemlon Products & Development Co. v. *United States*, 638 F.2d 1315 (5th Cir.), cert. denied, 454 U.S. 863 (1981)	11
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Rizzo v. *Goode*, 423 U.S. 362 (1976)	12
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Seattle Times Co. v. *Rhinehart*, 467 U.S. 20 (1984)	4, 5, 7
SEC v. *Dresser Industries, Inc.*, 628 F.2d 1368 (D.C. Cir.), cert. denied, 449 U.S. 993 (1980)	6, 10
SEC v. *Jerry T. O'Brien, Inc.*, 467 U.S. 735 (1984)	3
Tierney v. *Schweiker*, 718 F.2d 449 (D.C. Cir. 1983)	11
Tiffany Fine Arts, Inc. v. *United States*, 469 U.S. 310 (1985)	2
United States v. *Arthur Young & Co.*, 465 U.S. 805 (1984)	12

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United States v. *Chemical Bank*, 593 F.2d 451 (2d Cir. 1979) 13
United States v. *Morton Salt Co.*, 338 U.S. 632 (1950) ... 6
United States v. *Powell*, 379 U.S. 48 (1964) 4, 6
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United States v. *Stuart*, No. 87-1064 (Feb. 28, 1989) 6, 8
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In the Supreme Court of the United States

OCTOBER TERM, 1988

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UNITED STATES OF AMERICA, PETITIONER

v.

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ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

REPLY BRIEF FOR THE UNITED STATES

In our opening brief (at 15-40), we argued that the court of appeals erred in affirming the district court's authority to place restrictions on the IRS's use of material obtained pursuant to a valid summons—specifically, prohibiting its disclosure to other government agencies without further order of the court. This exercise of continuing supervision over the IRS's investigation exceeds the scope of the court's authority in a summons enforcement proceeding, which is to determine enforceability based upon whether a summons has been issued in good faith for a legitimate purpose authorized by Congress. Moreover, introducing this additional area of litigation into summons enforcement actions that are designed to be summary would interject unnecessary delays and threaten the effectiveness of IRS investigations. And the restriction is not justified

simply because it is intended to prevent IRS violations of Section 6103 of the Code. That Section itself already prohibits the IRS from unlawful disclosures, and Congress has established a mechanism for enforcing the prohibition. There is no warrant for converting a summary summons enforcement proceeding into an additional predisclosure remedy for potential Section 6103 violations—a remedy that was not contemplated by Congress and that is not available for confidential return information obtained by any means other than judicial enforcement of a summons.

Respondents' basic answer is that the court's authority to monitor the use of summoned material is inherent in its power to prevent its process from being abused and therefore need not be specifically conferred by Congress. Accordingly, they argue, the restriction imposed by the court below should not be viewed as a "restriction[ ] upon the IRS summons power," which this Court has repeatedly held "should be avoided absent unambiguous directions from Congress" (*Tiffany Fine Arts, Inc.* v. *United States,* 469 U.S. 310, 318 (1985)). Respondents further maintain that the summons enforcement court's continued supervision of the IRS's use of summoned material is essentially the same as a "protective order" issued by a court in discovery proceedings to protect the confidentiality of trade secrets. These contentions are flawed in several respects.

1. At the outset, we note that respondents attempt to trivialize this case by repeatedly suggesting (see, *e.g.*, Br. 26, 35-36, 37, 38, 41) that the issue here is simply whether the district court can prohibit the IRS from making illegal disclosures that are unrelated to its tax investigation. That unwarranted assumption of the illegality of every IRS action that is encompassed within the court's order begs the question, which is the procedural one of whether the court can require the IRS to obtain prior approval for actions to

be taken in the course of its investigation. The IRS in fact has no interest in making illegal disclosures and is not contesting the district court's order for the purpose of securing the right to make such disclosures; rather, it is objecting to the procedural hurdle erected by the district court that will unnecessarily hamper IRS investigations.

What respondents ignore is the fact that determining whether a particular disclosure is legal—for example, as necessary for investigative purposes (I.R.C. § 6103(k)(6))—may be a difficult task, and there may be disagreement on the correct answer. The government's objection here is to the summons enforcement court's retention of authority to make that determination in the midst of the IRS's investigation and prior to any disclosure. Even if the court ultimately agrees with the IRS and allows the disclosure, this procedure would seriously impede the investigation by causing delay and, in some cases, by requiring the IRS to give the targets a roadmap of the investigation in order to satisfy the court that the disclosure of the summoned material is authorized under Section 6103. Compare *SEC* v. *Jerry T. O'Brien, Inc.*, 467 U.S. 735, 750-751 (1984). Section 6103 provides fully adequate procedures for resolving questions of its applicability to particular disclosures, and for imposing appropriate remedies if the disclosure is held to be illegal, if and when such disclosures are made. The district court's order thus is an "unwarranted anticipatory interference" that "would disrupt the normal course" of the IRS's investigation (*O'Shea* v. *Littleton,* 414 U.S. 488, 500-501 (1974)), and it cannot be justified merely by the possibility that the IRS might in the future make a disclosure that the court would find to be violative of Section 6103.

2. a. Respondents' efforts (Br. 26-34) to characterize the restriction on enforcement of the summons in this case as a "protective order" of the sort routinely entered by

district courts to protect confidential commercial information are unavailing. First, protective orders imposed in discovery proceedings are based on authority specifically "conferred by Rule 26(c)" of the Federal Rules of Civil Procedure to limit discovery orders issued pursuant to Rule 26. *Seattle Times Co.* v. *Rhinehart*, 467 U.S. 20, 34 (1984). The summoned material here is requested under the IRS's statutory summons authority to aid in its tax collection function, and therefore Rule 26(c) does not govern its request.[1]

It is true that courts have inherent equitable power to prevent abuse of their process (see *Seattle Times Co.* v. *Rhinehart*, 467 U.S. at 35; *Gumbel* v. *Pitkin*, 124 U.S. 131, 145-146 (1888)), but that power does not justify the restriction imposed here. A court has the power to prevent a litigant from invoking its process through a pretext to obtain material for a purpose unrelated to the litigation and the justification for the court's order. There is no occasion for a court to invoke such an inherent power in the summons enforcement context, however, because the rules governing summons enforcement require the court to deny enforcement in such circumstances. In *United States* v. *Powell*, 379 U.S. 48, 58 (1964), this Court made clear that a summons is not to be enforced if it would be an abuse of process, such as "if the summons had been issued for an improper purpose." But it is no abuse of the court's process to seek enforcement of a summons for material relevant to a legitimate tax investigation. Even if the material

[1] Moreover, even if it could otherwise be argued that the Federal Rules authorize the type of restriction imposed by the district court here, this Court has pointed out that the Federal Rules of Civil Procedure do not apply "inflexibl[y]" to a summons enforcement action and should not be applied "to impair a summary enforcement proceeding so long as the rights of the party summoned are protected." *Donaldson* v. *United States*, 400 U.S. 517, 528-529 (1971).

ultimately is used in a way that is unlawful, that is a distinct problem that does not reflect abuse of the court's process in obtaining the material for a legitimate purpose.[2]

Moreover, an order enforcing an IRS summons bears little resemblance to a discovery order in civil litigation, and therefore the restriction placed by the district court here upon the IRS's investigatory authority cannot reasonably be analogized to a "protective order." First, the proceedings are quite different. A protective order restricting the use of a discovered material is entered in a proceeding to adjudicate a particular case or controversy—one over which the district court exercises full authority, especially with respect to the discovery process. The only reason that discovery is granted at all is "for the sole purpose of assisting in the preparation and trial, or the settlement of, litigated disputes" (*Seattle Times Co.* v. *Rhinehart*, 467 U.S. at 34). The court's power to restrict that discovery by the

[2] Respondents describe (Br. 26-27, 35-36) the allegations they made to the district court to try to show that the summons in this case was issued for the unlawful purpose of discovering evidence for use in the government's civil litigation with the Church, and they intimate that the district court credited these allegations and therefore imposed the restriction on the use of the summoned material to forestall expected "imminent violations of § 6103" (Resp. Br. 36). The court, however, did not credit respondents' allegations, and it did not find that the government was likely to violate Section 6103. On the contrary, the court stated (J.A. 45-46): "There's not an iota of evidence that this summons is being prosecuted for any reason other than to gather information for the on-going investigation. • • • No indication that it's being used for a collateral purpose." Rather, the court appears to have imposed the restriction because it viewed it as a harmless way of defusing respondents' allegations that the material would be furnished unlawfully to other government agencies that were engaged in litigation with the Church. However well-intentioned the court may have been, its order exceeded its authority in the summons enforcement proceeding, and the procedural complications introduced by such an order are far from harmless to the IRS's investigative capabilities.

entry of protective orders is a manifestation of the "complete control that the court has over the discovery process." C. Wright & A. Miller, *Federal Practice and Procedure*, § 2036, at 267 (1970).

By contrast, a summons is issued in aid of an IRS investigation. That investigatory power is a broad one that is not confined to a particular dispute pending before a court. Rather, an IRS summons is akin to a grand jury subpoena (see *United States* v. *Bisceglia*, 420 U.S. 141, 147-148 (1975)); the IRS " 'does not depend on a case or controversy for power to get evidence but can investigate merely on suspicion that the law is being violated, or even just because it wants assurance that it is not' " (*United States* v. *Powell*, 379 U.S. at 57, quoting *United States* v. *Morton Salt Co.*, 338 U.S. 632, 642-643 (1950)). In contrast to an adjudication in which a discovery order is entered, the district court has no role to play in the conduct of such an investigation, and there is no comparable reason for it to enter protective orders. See *Dow Chemical Co.* v. *Allen*, 672 F.2d 1262, 1267-1268 (7th Cir. 1982); *SEC* v. *Dresser Industries, Inc.*, 628 F.2d 1368, 1386 (D.C. Cir.), cert. denied, 449 U.S. 993 (1980). The court's authority is limited to that conferred upon it by Congress to enforce or not to enforce the summons (see I.R.C. §§ 7402(b) and 7604(a)). As this Court recently reiterated, "[s]o long as the IRS itself acts in good faith, as that term was explicated in *United States* v. *Powell*, 379 U.S. at 57-58, and complies with applicable statutes, it is entitled to enforcement of its summons" (*United States* v. *Stuart*, No. 87-1064 (Feb. 28, 1989), slip op. 15-16).

Indeed, the function of a protective order is fundamentally different from that of the restriction on the IRS entered in this case. A protective order defines the extent to which discovered material is confidential and then provides protection for that material, which could otherwise

freely be disseminated to the public. As this Court has explained, "[b]ecause of the liberality of pretrial discovery permitted by Rule 26(b)(1), it is necessary for the trial court to have the authority to issue protective orders conferred by Rule 26(c)" (*Seattle Times Co.* v. *Rhinehart*, 467 U.S. at 34). The Federal Rules of Civil Procedure "permit the broadest scope of discovery and leave it to the enlightened discretion of the district court to decide what restrictions may be necessary in a particular case" (C. Wright & A. Miller, *supra*, § 2036, at 268). In other words, the liberal discovery rules themselves place almost no restrictions on the litigants' access to documents and do not protect their confidentiality; rather, they leave that protection to the "very wide discretion" (*id.* at § 2043, at 305) of the district court. This approach fully accords with the long-established principle that, when it is necessary to reveal confidential information in the course of particular litigation, "it will rest in the judge's discretion to determine whether, to whom, and under what precautions, the revelation should be made" (*E.I. Du Pont de Nemours Powder Co.* v. *Masland*, 244 U.S. 100, 103 (1917)).

When a court is requested to order the production of material in response to an IRS summons, its role is markedly different. The court has no discretion, nor any need, to identify any of the material produced as confidential. Section 6103 already establishes the confidentiality of the summoned material and defines the scope of its protection, which the district court has no discretion to alter.[1]

[1] That the district court in this case did not purport to alter the substantive confidentiality rules of Section 6103 does not make defensible its order creating a new and intrusive procedure for enforcing those rules. On the contrary, the fact that Section 6103 already prohibits the conduct at which the district court's order assertedly was targeted eliminates any enforcement justification for the order and therefore renders its deleterious effects on the IRS's investigative functions all the more improper.

Thus, unlike a protective order, the restriction imposed in this case does not serve the purpose of safeguarding a litigant from a harmful disclosure that would be permitted in the absence of the protective order; the order in this case is simply another means of enforcing the protection already provided by Section 6103—one that invites " 'protracted litigation' " that would undermine the congressional mandate that " 'summons enforcement proceedings should be summary in nature' " (*United States* v. *Stuart*, slip op. 15, quoting 1 S. Rep. No. 494, 97th Cong., 2d Sess. 285 (1982)). In sum, the purposes served by a protective order in the civil discovery context have no application in a summons enforcement proceeding.

b. There is similarly no force to respondents' attempt (Br. 32-34) to support its position by reference to cases involving administrative subpoenas. Indeed, this Court's decision in *FCC* v. *Schreiber*, 381 U.S. 279 (1965), undermines, rather than supports, the district court's restriction here on the use of summoned material. This Court in *Schreiber* harshly criticized the district court's order preventing the Commission from disclosing all subpoenaed information without prior approval of the court (*id.* at 295-300), and it ordered the district court "to enforce the Commission's orders and subpoena without qualification" (*id.* at 300). The Court noted that the district court's order usurped the Commission's authority to determine whether the documents should be disclosed (*id.* at 296) and that it could hamper the Commission's investigation by "den[ying] the benefit of other evidence stimulated by disclosure" (*id.* at 297). Moreover, the question in *Schreiber* was whether certain material should be accorded confidential treatment. That is not an issue in the summons enforcement context because *all* of the summoned material is already accorded confidential treatment

under Section 6103. Thus, *Schreiber* offers no support whatsoever for respondents' position.

The lower court cases cited by respondents similarly provide no support for their submission. *FTC* v. *Lonning*, 539 F.2d 202 (D.C. Cir. 1976), on which respondents primarily rely (see Br. 33), involved an adjudicatory proceeding before the agency, not an investigation. See also *Dow Chemical Co.* v. *Allen, supra.* The issue in *Lonning* was the company's objection to the alleged inadequacy of the confidentiality protections afforded by the agency; the court of appeals found those protections to be adequate and therefore it agreed with the district court that no protective order should be imposed. See 539 F.2d at 210-211. In the summons enforcement context, the substance of the confidentiality protections for the summoned material is furnished by Section 6103, and respondents cannot and do not suggest that that protection is inadequate. As in *Lonning*, therefore, since the substance of the confidentiality protection already afforded is adequate, it is not appropriate for the court to enter a protective order.

The other cases relied upon by respondents are directly contrary to their submission. *FTC* v. *Texaco, Inc.*, 555 F.2d 862 (D.C. Cir.), cert. denied, 431 U.S. 974 (1977), closely follows this Court's decision in *Schreiber*. The en banc court of appeals there rejected an order requiring that the agency's release of subpoenaed documents first be cleared with the court, criticizing the order as "plac[ing] the court in a position of supervision and control over the Commission in the exercise of its statutory duties" (555 F.2d at 884). Instead, the court held that the determination of confidentiality in the first instance lay with the agency, not with the court (*id.* at 883-884 & n.62). The court concluded that the district court's order "effectively blocked legitimate avenues of the FTC's inquiry" and "cannot be

reconciled with the narrow ambit * * * of a court asked to enforce an agency's investigative subpoena" (*id.* at 885).

In *SEC* v. *Dresser Industries, Inc., supra,* the en banc court of appeals rejected an attempt to restrict the SEC's authority to release to another government agency documents obtained pursuant to an administrative subpoena. The court stated that the company was "obligated under the securities laws to provide documents to the SEC in obedience to a lawful subpoena" and that its confidentiality rights were "the product solely of the laws governing the SEC" (628 F.2d at 1383). The court subsequently concluded that "the investigation is in good faith * * * [and] [t]here is, therefore, no reason to impose a protective order" (*id.* at 1387). The court added that the imposition of a " 'prophylactic' rule against cooperation between the agencies" would operate "to the detriment of securities law enforcement" (*ibid.*).

To the extent that respondents rely upon the fact that the agencies in those cases agreed to give the companies involved prior notice before disclosing arguably confidential information (see Br. 33 n.28), we note that the notice provisions were adopted voluntarily by the agencies, not imposed pursuant to some "inherent power" of the cou t. See *SEC* v. *Dresser Industries, Inc.*, 628 F.2d at 1389; *FTC* v. *Texaco, Inc.*, 555 F.2d at 884 n.64. Moreover, as we have explained, those proceedings concerned disputes over whether particular documents should be treated as confidential. Here, by contrast, it is agreed that Section 6103 provides confidentiality protection for the summoned material, and the district court's restriction serves only to introduce an additional pre-disclosure procedure for enforcing that protection.

3. Respondents also err in arguing (Br. 43-48) that the restriction on the IRS's use of summoned material imposed in this case is authorized by the prohibition on

disclosure of tax return information contained in Section 6103. As we explained in our opening brief (at 32-37), it is undisputed that Section 6103 restricts the dissemination or disclosure of return information in the hands of the IRS, including information obtained pursuant to a summons. But Section 6103 contains its own enforcement scheme, and it does not authorize conditioning enforcement of a summons upon monitoring by the summons enforcement court of disclosures of the summoned material. Indeed, such a role for the summons enforcement court would subject summoned material to a pre-disclosure proceeding that was not contemplated by Congress for any other type of return information.

Respondents argue that because Section 6103 does not explicitly proscribe pre-disclosure relief for a possible violation, a blanket requirement of pre-disclosure approval by the summons enforcement court would implement the intent of Congress. This argument, too, is erroneous. First, the authority cited by respondents in fact suggests that a taxpayer cannot bring suit to enjoin a proposed disclosure on the ground that it might violate Section 6103. In *Kemlon Products & Development Co.* v. *United States,* 638 F.2d 1315 (5th Cir.), cert. denied, 454 U.S. 863 (1981) (see Resp. Br. 47), the court of appeals held that such a suit was barred by the Tax Anti-Injunction Act, 26 U.S.C. 7421(a). Like respondents (see Br. 38 n.34), the taxpayers there argued that the Act did not apply because the proposed disclosure would not be in furtherance of the collection of taxes. In rejecting that contention, the court of appeals held that the IRS's contention that the disclosure was authorized under Section 6103(k)(6) sufficed to bring the Anti-Injunction Act into play. That rationale is equally applicable to this case (see point 1, *supra*).[4]

[4] *Tierney* v. *Schweiker,* 718 F.2d 449, 456-457 (D.C. Cir. 1983), which respondents also cite (Br. 47), was a declaratory judgment ac-

In any event, it is undeniable that Congress did not contemplate or facilitate, as part of the enforcement scheme of Section 6103, suits to enjoin IRS disclosures on the ground that they would violate the statute's protections. Such an action seeking an injunction could be commenced only upon the fortuity of the taxpayer's learning that an IRS disclosure was imminent. In contrast to Section 6110(f) of the Code, where Congress established a notice requirement and provided for a pre-disclosure remedy (see U.S. Br. 35), Section 6103 does not require or otherwise envision that a taxpayer will receive notice of a proposed disclosure. Thus, it cannot be said that the conditional enforcement order imposed by the district court here implements congressional intent in enacting Section 6103. Certainly, Section 6103 does not provide the sort of "unambiguous directions from Congress" (*United States* v. *Arthur Young & Co.*, 465 U.S. 805, 816 (1984)), that could justify so substantial a procedural restriction upon the summons power.

Essentially, respondents argue that conditional enforcement orders are necessary because otherwise the IRS can be expected to violate Section 6103 in the course of using the summoned material. But courts are not empowered to enter orders requiring persons to obey the law in the absence of evidence that violations are otherwise likely to occur. See, *e.g.*, *City of Los Angeles* v. *Lyons*, 461 U.S. 95 (1983); *United States* v. *W.T. Grant Co.*, 345 U.S. 629, 633 (1953). Moreover, a party bears an exceptionally heavy burden in seeking to enjoin the activity of a government agency. See *Rizzo* v. *Goode*, 423 U.S. 362, 378-379 (1976). There is no justification for such an order here. As this Court has noted in the specific context of an administrative subpoena, "administrative agencies are entitled * * * to the presumption * * * that they will act properly and according to law" (*FCC* v. *Schreiber*, 381 U.S. at 296). Applying this principle in a situation similar to this case, the Second Circuit refused to deny enforcement of a summons or to place restrictions on the use of the summoned material despite allegations by the taxpayer that the information would be shared with the Justice Department in violation of Section 6103. *United States* v. *Chemical Bank*, 593 F.2d 451, 455-458 (2d Cir. 1979). The court there stated that "the judiciary does not anticipate that the Government will act unlawfully" (*id.* at 455) and observed that a presumption that improper disclosures would occur was further undermined in "view of the serious consequences of violation of the privacy of taxpayer records, which include criminal penalties" (*id.* at 457-458). Correspondingly here, the district court erred in attempting to augment the scheme established by Congress to enforce Section 6103 by transforming a summary enforcement proceeding into a vehicle for monitoring the IRS's use of summoned material.[5]

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tion that did not purport to recognize a court's inherent authority to enjoin the IRS from disclosing material lawfully in its possession.

[5] Respondents suggest (Br. 36 n.31, 49) that the Court may wish to remand the case for the entry of a narrower restriction barring the IRS from disclosing the summoned information to government attorneys involved in the civil ligitation with the Church that was the subject of respondents' allegations of bad faith in the district court. While we would not regard such a restriction as proper, for the reasons already stated, we note that it would be inappropriate in any event in light of the termination of the civil litigation in question. Both of the suits to which respondents adverted in the district court were dismissed within a few months of its decision, and those dismissals have long since become final. The district court hearing was held on April 29 and April 30, 1985. The Church's civil damage suit against the United States and various federal officials in the District of Columbia was dismissed on April 9, 1985, as a discovery sanction for the Church's refusal to produce L. Ron Hubbard for a deposition, and the dis-

4. a. As respondents state, it is well established that the crime-fraud exception can be invoked to defeat a claim that attorney-client communications are privileged only if "a prima facie case [is made] that the communications were made in the furtherance of a future or ongoing crime or fraud" (Resp. Br. 11). The court of appeals unequivocally held that this prima facie showing must be made by independent evidence, *i.e.*, without resort to the contents of the communications themselves. The en banc court, reaffirming its circuit precedent of *United States* v. *Shewfelt*, 455 F.2d 836, 840 (9th Cir.), cert. denied, 406 U.S. 944 (1972), stated that "the government must make a prima facie showing, independent of the communications involved, that the attorney-client communications were in furtherance of an intended or present illegality" (Pet. App. 2a). Applying this rule, the court of appeals declined to consider any of the "nonindependent evidence" introduced—including a partial transcript of the tapes and the affidavit of an IRS agent who had already listened to the tapes (see U.S. Br. 4-5 & n.2); on that basis, the court of appeals concluded that the remaining evidence did not show the applicability of the crime-fraud exception and therefore held that the MCCS tapes were protected by the attorney-client privilege (see Pet. App. 23a-24a).

This Court granted certiorari to consider the correctness of the court of appeals' rule that the applicability of the crime-fraud exception must be proved by independent

missal was affirmed on appeal. *Founding Church of Scientology* v. *Webster*, complaint dismissed, No. 98-0107 (D.D.C. Apr. 9, 1985), aff'd, 802 F.2d 1448 (D.C. Cir. 1986), cert. denied, 108 S. Ct. 199 (1987). A similar suit in the Central District of California was dismissed as a discovery sanction on July 26, 1985, and appeals from that order were dismissed. *Church of Scientology* v. *Linberg*, complaint dismissed, No. 77-2564 (C.D. Cal. July 26, 1985), appeals dismissed, Nos. 85-6292 and 86-5535 (9th Cir. Apr. 22, 1988).

evidence. We explained in our opening brief (at 40-49) that there is no justification for such a rule, which marks a sharp departure from the usual treatment of privilege questions. Respondents, in turn, make no effort to defend the correctness of the court of appeals' rule. Indeed, respondents do not even address the question of the character of the evidence that may be used to defeat the claim of privilege. Instead, respondents discuss a different question—the threshold showing that must be made before a district court may undertake an in camera examination of attorney-client communications in order to to determine whether the documents are in furtherance of a crime or fraud (see Resp. Br. i, 12-25). As we noted in our opening brief (at 42 n.23), this issue was not addressed below and is not directly presented by this case. And respondents' argument does not provide an alternative basis for affirmance of the judgment below; on the contrary, application of the rule respondents appear to advance clearly would require reversal of the judgment below.

b. Respondents apparently contend that an independent evidence requirement applies, not in determining whether documents are privileged (as the court of appeals held), but rather at the preliminary stage of a two-step process. Before a court may review disputed documents in camera to determine whether the crime-fraud exception is applicable, respondents argue, "the opponent of the privilege should be required to produce evidence, independent of the communications themselves, to indicate that the privileged communications were in furtherance of a crime or fraud" (Resp. Br. 13).[6] Except for the "*some* in-

[6] This contention necessarily differs from the court of appeals' independent evidence requirement with respect to the quantum of independent evidence that must be introduced. The court of appeals requires that there be independent evidence sufficient to establish a

dependent evidence" limitation (*id.* at 14 (emphasis added)), respondents' two-step approach is not substantially different from that suggested by the government and generally applied by the courts—namely, the district court must decide in its discretion, based on the submission made by the opponent of the privilege, whether there is a sufficient basis for examining the contested documents in camera in order to decide whether the crime-fraud exception is applicable.[7] But respondents' proposed additional limitation is erroneous. Just as there is no reason for allowing documents to be shielded by the attorney-client

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prima facie case that the communications were in furtherance of a crime or fraud, *i.e.*, to defeat the claim of privilege. Respondents presumably (though they do not say) would require something less in order to justify in camera inspection; after all, if the independent evidence is sufficient to establish a prima facie case that would defeat the privilege, the second step becomes superfluous for there is no longer any need for an in camera inspection to determine whether the applicability of the crime-fraud exception has been shown.

[7] Despite the clear statements to the contrary in our reply at the petition stage (at 9 n.7) and our brief on the merits (at 42 n.23), respondents insist on mischaracterizing the government's position as one that *requires* the district court to conduct an in camera inspection "upon the mere assertion that the crime-fraud exception applies" (Resp. Br. 15; see also *id.* at 7, 12). We recognize that the district court has discretion to decline to conduct an in camera examination in some cases if it is not shown that the circumstances warrant such an inquiry. The issue in this case, however, is whether the district court is ever *permitted* to consider nonindependent evidence in making the crime-fraud determination. Since this case does not present the issue whether a district court abused its discretion in conducting an in camera review of documents, we have not endeavored to explore what "standard[s]" (cf. Resp. Br. 12) would be applicable to that exercise of discretion. We note that, other than the inexplicable requirement that some "independent evidence" be introduced, respondents also do not set forth any "standards" for measuring the showing that must be made before the district court is permitted to conduct in camera review.

privilege in the face of probative (albeit not "independent") evidence that the communications were in furtherance of crime or fraud (see U.S. Br. 40-49), there is similarly no reason for imposing an independent evidence restriction upon the district court's power to conduct in camera review.

The only justification offered by respondents for placing an "independent evidence" limitation on the submission to the district court is the assertion that "open and frank" attorney-client discussions will be chilled if in camera review can occur in the absence of some "independent evidence" of crime or fraud (see Resp. Br. 13). There is no basis, however, for such an assumption; the fear of exposure of privileged information to the court itself has never been regarded as an overriding concern in connection with other privilege questions for which the availability of in camera review is undisputed (see U.S. Br. 44-45).[8]

Moreover, respondents' suggested limitation goes well beyond its professed goal of protecting against exposure

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[8] There is no merit to respondents' contention (Br. 20) that *Clark* v. *United States*, 289 U.S. 1 (1933), supports an independent evidence rule. This court stated in *Clark* that the attorney-client privilege is not lost upon a mere charge of fraud, but rather there "must be '*prima facie* evidence that it has some foundation in fact' " (*id.* at 15 (quoting *O'Rourke* v. *Darbishire*, [1920] A.C. 581, 604 (H.L. (E.)))). *Clark* does not suggest, however, that the evidence of fraud must be independent of the communications themselves. As discussed in our opening brief (at 46) and reflected even in the cases cited by respondents (see, *e.g.*, Resp. Br. 21 n.14), the practice in the federal courts embodies the understanding that the contents of the communications themselves can be considered in determining the applicability of the crime-fraud exception. And two courts of appeals have made this explicit. *In re Antitrust Grand Jury*, 805 F.2d 155, 168 ("*in camera* review of the documents could have assisted the court in determining whether a *prima facie* violation had been made"); *In re Berkley & Co.*, 629 F.2d

of confidential communications to the court when there is insufficient basis for in camera review. Respondents' position would deny probative, unprivileged evidence to the factfinder even when in camera inspection is not involved. In this case, for example, there was ample evidence that the crime-fraud exception was applicable, without the need for in camera inspection of the contested documents. Because the MCCS tapes had inadvertently been released by respondents (see Pet. App. 21a) and examined by other persons, the court had before it affidavits attesting to the contents of the tapes. Respondents suggest no justification for preventing the court from considering this highly probative evidence—even in making the preliminary determination whether to examine the tapes in camera—simply because it is not "independent evidence." The inevitable result of such a rule would be that the court in some cases would have to withhold relevant evidence from the factfinder even though the court would know (from nonindependent evidence) that the evidence is not privileged.[9] There is no reason to require that perverse outcome.

548, 553 n.9 (8th Cir. 1980) (expressly rejecting *Shewfelt*). We note that respondents are correct in stating (Br. 21 n.13) that the district court in *Antitrust Grand Jury* had ordered production of the contested documents; we inadvertently erred in stating (Br. 45) that the court of appeals had reversed a district court order upholding the claim of privilege. The language quoted from the court of appeals' opinion, however, still constitutes an emphatic rejection of any independent evidence requirement.

[9] Indeed, respondents presumably would argue that, even if a district court had examined documents that self-evidently fell within the crime-fraud exception, the court of appeals could hold the documents to be privileged on the ground that there had been insufficient "independent evidence" to justify the in camera examination.

In any event, respondents' proposed independent evidence rule provides no basis for affirmance of the judgment below. Applying *Shewfelt*, the court of appeals considered only whether there was sufficient independent evidence to establish a prima facie case that would defeat the privilege; it did not consider whether there was some lesser quantum of independent evidence that would support in camera review of the tapes. Indeed, it is undeniable that, in addition to the affidavits and partial transcripts, there was "some independent evidence" (Resp. Br. 14) here—characterized by the court of appeals as "not altogether insubstantial" (Pet. App. 24a)—that the communications on the tapes were in furtherance of crime or fraud. Thus, it would appear that, under the test suggested by respondents, the district court should have reviewed the tapes in camera to determine whether the crime-fraud exception applies. At all events, the judgment below that the tapes are privileged because the independent evidence is "not sufficient to make out the requisite prima facie showing" (*ibid.*) for invocation of the crime-fraud exception cannot stand even under respondents' submission.

For the foregoing reasons and those stated in our opening brief, the judgment of the court of appeals should be reversed.

Respectfully submitted.

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MARCH 1989

U.S. GOVERNMENT PRINTING OFFICE 1989—241 699 00136

Supreme Court, U.S.
FILED
JAN 30 1989
JOSEPH F. SPANIOL, JR.
CLERK

NO. 88-40

IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

UNITED STATES OF AMERICA,
Petitioner

v.

FRANK S. ZOLIN, ET AL,
Respondents

BRIEF OF BERNARD M. BARRETT, JR., M.D. AS AMICUS CURIAE

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INTEREST OF THE AMICUS CURIAE

Bernard M. Barrett, Jr., M.D., the petitioner in *United States v. Barrett*, 837 F.2d 1341 (5th Cir. 1988), *pet. for cert. pending*, No. 87-1705, has an interest in this case that is representative of the interests of the ever increasing number of taxpayers who are made targets of administrative criminal tax investigations by the I.R.S. Of the administrative criminal tax investigations the I.R.S. conducts, only about one-third are referred to the Justice Department for criminal prosecution. 1982 Comm'r and Chief Couns. Ann. Rep. 15. Therefore, approximately two-thirds of the taxpayers who are subjected to the administrative investigation techniques of the Criminal Investigation Division of the I.R.S. do not have prosecution recommended against them and are never prosecuted. One of the techniques utilized in I.R.S.

administrative criminal investigations of taxpayers, such as used in *Barrett*, is the mass mailing of information solicitations, known as "circularization letters," to a doctor's patients, a lawyer's clients, a business's customers or a taxpayer's relatives. Since the I.R.S. discloses in such circularization letters the fact that the doctor, lawyer, businessman or other taxpayer is under criminal investigation, the potential for harm to the taxpayer's reputation is substantial. Revealing that a taxpayer is under criminal investigation is an unnecessary disclosure of statutorily protected "return information." Section 6103(b)(2)(A).[1] The district court in a summons enforcement proceeding should have the power to conditionally enforce a summons to prevent such an improper disclosure and violation of the taxpayer's confidentiality rights.

The Handbook for Special Agents discusses the use of circularization letters and provides that "caution must be exercised not [to] damage the reputation of the taxpayer by making [such letters] either offensive or suggestive of any wrongdoing by the taxpayer." See 5 CCH Internal Revenue Manual ¶ 9781, Handbook for Special Agents (Circular Form Letter), ch. 347, 347.2, at 28,691.

It is significant to note that chapter 347.2 of the Handbook for Special Agents was supplemented on July 7, 1988, to add the sentence "It *must not* be disclosed in the body of the letter that the taxpayer is under investigation by the Criminal Investigation Division." (Emphasis in the original.) The special agent's mass circularization letter in *Barrett* included such improper statement and the special agent's desire to continue mail-

1. All references to "Sections" are to the Internal Revenue Code of 1986, Title 26, United States Code, unless otherwise noted.

ing such letters with the aid of the summoned information is inconsistent with the I.R.S.'s own admission that the inclusion of such "return information" is improper. Because the Handbook for Special Agents recognizes that the inclusion of such "return information" in circularization letters is improper, it is incongruous for the government to argue that a court must blindly enforce a summons for the I.R.S. to be able to continue mailing mass circularization letters that improperly include such "return information."

The Handbook for Special Agents also provides, immediately after the chapter regarding circularization letters, instructions about the strictly limited situations where disclosures of "return information" are permitted to be used, including the specific instruction that Section 6103(k)(6) only authorizes investigative disclosures "to the extent necessary to gather data which may be relevant to a tax investigation." 5 CCH Internal Revenue Manual ¶ 9781 (Disclosure), ch. 348, 348.3 at 28,691-28,691-2. Furthermore, I.R.S. Policy Statement P-9-29 (Investigative Policy) provides that ". . . unnecessary embarrassment to the taxpayer should be avoided" and I.R.S. Policy Statement P-9-35 (Legal Rights of Persons Investigated to be Observed) provides that "[t]he methods which the Service will use . . . will in all respects stay within the bounds of the law." 1 CCH Internal Revenue Manual (Policies of the I.R.S. Handbook - Criminal Investigation) pp. 1305-59-60. At Internal Revenue Manual § 9382.1(4), a special agent conducting an administrative criminal investigation is instructed to be "discreet" and that "he/she must not unnecessarily injure the reputation of the person being investigated." 5 CCH Internal Revenue Manual ¶ 9382 (Conduct Standards for Special Agent During Investigations), p. 28,211.

Although the Internal Revenue Manual in these various places recognizes and re-emphasizes the importance of not harming taxpayers' reputations nor violating Section 6103 via circularization letters or otherwise, the government inconsistently argues to this Court that a pre-disclosure remedy preventing the improper use of circularization letters or other violations of Section 6103 would "stand . . . on its head" the voluntary assessment nature of this country's system of taxation. (Govt's brief, p. 36.) To the contrary, not allowing a pre-disclosure remedy preventing the improper use of circularization letters or other violations of confidentiality rights of taxpayers will necessarily cause taxpayers to become less willing to voluntarily turn over their book and records and more apt to force the I.R.S. to file summons enforcement cases to obtain such records, thereby causing a greater administrative burden upon the I.R.S. and the courts.

The government has failed to acknowledge or even address the fact that the pre-disclosure remedy sought by Dr. Barrett would not prevent the I.R.S. from obtaining or using any information from the taxpayer or third-parties, nor the I.R.S.'s use of mass circularization letters to obtain information from third-parties. The pre-disclosure remedy sought is one that would only prevent the I.R.S. from including in its mass circularization letters to third-parties the unnecessary fact that the taxpayer is the target of an administrative criminal investigation by the I.R.S (*Barrett* pet., p. 10.) The disclosure of the fact that a taxpayer is under an administrative criminal tax investigation is a disclosure of "return information" as defined in Section 6103(b)(2)(A) and when disclosed multiple times via the use of mass circularization letters, it is unnecessary and is in violation of Section 6103(a).

Where the I.R.S. seeks a federal district court's order to enforce its summons to obtain the addresses of all the taxpayer's customers, clients, or patients so that it can continue mass mailing circularization letters, disclosing to such third-parties that the taxpayer is under an administrative criminal tax investigation, as in *Barrett*, the district court should have the authority to prevent such a gross violation of Section 6103. Preventing such a violation would not deny any information to the I.R.S., either from the taxpayer or anyone else, including the third-party patients; it would only eliminate from the mass circularization letters the unnecessary disclosure that the taxpayer is the target of an administrative criminal tax investigation.

Given the statistical fact that approximately two-thirds of the cases the I.R.S. investigates are not referred for prosecution, taxpayers' reputations may be harmed without any likely benefit to the I.R.S. If a federal district court does not have the jurisdiction, in ordering enforcement of an I.R.S. summons, to condition its order to protect the rights of the taxpayer under investigation, the power to harm the taxpayer's reputation will be put in the hands of the investigating I.R.S. agent, and may be abused by that agent unchecked. This Court should not require federal district courts to merely observe and do nothing about such threatened administrative misconduct where potential harm to taxpayers' reputations exists that violates Congress' stated policy to preserve the confidentiality rights of taxpayers and jeopardizes the voluntary assessment nature of this country's system of taxation.

Too often, mass circularization has meant unnecessary, widespread disclosure that the taxpayer is the subject of a criminal investigation by the Criminal Investigation

Division of the I.R.S. with the result that his or her professional business and personal reputation is substantially and irreparably harmed, despite the fact that the Service ultimately concludes that criminal prosecution is not justified. In such circumstances, a taxpayer whose case ultimately warrants civil adjustment, at most, has been unfairly branded a criminal suspect by the Service. Section 6103, enacted as part of the Tax Reform Act of 1976, forbids this kind of destructive and unnecessary disclosure of uncharged and unproven accusations of criminal conduct whether or not prosecution is recommended or ultimately undertaken.

SUMMARY OF ARGUMENT

The fact that a taxpayer is under criminal investigation by the Service constitutes confidential "return information" as defined in Section 6103(b)(2)(A); disclosure of that fact is authorized only if "necessary in obtaining information" which would not "otherwise [be] reasonably available." Section 6103(k)(6). Disclosure that a taxpayer is under criminal investigation violates Section 6103(k)(6) because it is unnecessary for the I.R.S. to reveal that fact to obtain the information it needs when it interviews or otherwise communicates with third parties, especially when mass disclosures of such fact are made via circularization letters.

The unauthorized disclosure of confidential return information may result in the imposition of criminal sanctions under Section 7213, and can be the basis of a cause of action for damages by an aggrieved taxpayer under Section 7431. However, the possibility of criminal prosecution of an offending I.R.S. agent or a damage suit against the government cannot undo the harm caused

by the unlawful disclosure and do not afford real protection to an injured taxpayer.

Moreover, these statutory civil and criminal sanctions are unavailable where the threat of unauthorized disclosure by the Service has not yet ripened into a violation of Section 6103. Federal district courts, when asked by the Service to order the enforcement of a summons during a criminal tax investigation, do possess the power to condition enforcement of the summons to ensure that the Service will not violate the confidentiality provisions of Section 6103 while the investigation is conducted. To hold otherwise would constitute a serious encroachment on the power of a federal court to control its own process, when an administrative agency, such as the I.R.S., appears to be employing the judicial process for a purpose that threatens important congressionally protected interests of the party under investigation.

The exercise of such power by the district court, upon a proper showing of the need for such conditional enforcement, would not improperly interfere with the I.R.S.'s ability to conduct criminal tax investigations or otherwise fulfill its mission and is fully consistent with Congress' intent to protect taxpayers' confidentiality rights. If district courts, however, are denied the power to enforce an administrative summons conditionally, the protection afforded to taxpayers by Congress against illegal, arbitrary, capricious and abusive conduct by the Service will be sharply diminished.

Accordingly, this case, as well as *Barrett*, presents an issue of compelling public interest and of special significance to those taxpayers who are administratively subjected to a criminal investigation by the I.R.S.

ARGUMENT

A FEDERAL DISTRICT COURT HAS THE POWER TO ENFORCE AN I.R.S. SUMMONS CONDITIONALLY IN ORDER TO PREVENT ABUSE OF ITS PROCESS AND PROTECT THE CONFIDENTIALITY RIGHTS OF THE TAXPAYER

Introduction

Congress did not make the summons power granted to the I.R.S. self-enforcing. The I.R.S. "is given no power to enforce compliance or to impose sanctions for noncompliance." *Reisman v. Caplin*, 375 U.S. 440, 446 (1964). The authority to compel compliance is entrusted to the district courts which have jurisdiction to enforce an I.R.S. summons under Sections 7402(b) and 7604(a). In exercising this authority, a district court is empowered to prevent abuse of its process. It possesses, under well established principles, broad discretion to craft its enforcement order in such a manner and on such terms that the summons for which enforcement is requested serves only purposes permitted by law.

The district court's power to prevent abuse of its process amply embraces the authority to modify a summons to protect a taxpayer's legally recognized interests, including his right to the confidentiality of his return information. If protection of that right, in the judgment of the district court, requires conditional enforcement of the summons, the power of the court to control its own process is broad and flexible enough to authorize such relief.

Disclosure that an Identified Taxpayer is under Criminal Investigation is a Disclosure of Tax Return Information within the Meaning of Section 6103 of the Internal Revenue Code

Before 1977, tax returns were "public records," but were only open to inspection under Treasury regulations approved by the President or under Presidential order. Following the enactment of the Privacy Act of 1974, Congress in 1976 addressed the "unique aspects" of tax returns. Staff of Joint Comm. on Taxation, 94th Cong. 2d Sess., General Explanation of the Tax Reform Act of 1976, 315. Congress concluded that the I.R.S. had more information about citizens than any other federal agency and that other agencies sought access to that information, but that citizens reasonably expected that tax return information they were required to supply to the I.R.S. would be kept private. If the I.R.S. abused that reasonable expectation of privacy, the loss of public confidence would seriously impair the tax system.

Accordingly, Congress amended Section 6103 of the Code to provide that tax returns and tax return information are "confidential" and are not subject to disclosure except in limited situations that the section delineates where disclosure is warranted. *Id.* In the 13 areas disclosure is provided for, Congress "attempted to balance the particular office or agency's need for the information involved with the citizens right to privacy, as well as the impact of the disclosure upon the continuation of compliance with our country's voluntary tax assessment system." *Id.*

In Section 6103, both "return information" and "disclosure" are broadly defined. Return information includes

"a taxpayer's identity . . . whether the taxpayer's return was, is being, or will be examined or subjected to other investigation or processing . . ." 26 U.S.C. § 6103(b)(2). The term "disclosure" is correspondingly broadly defined to mean "the making known to any person in any manner whatever, a return or return information." 26 U.S.C. § 6103(b)(8). It follows that the disclosure to any person that an identified taxpayer is under criminal investigation is a disclosure of return information.

In Section 6103(k)(6), Congress attempted to balance the need for the I.R.S. to obtain information in the course of its official function and the taxpayer's privacy right. The statute permits a criminal investigator, for example, to "disclose return information to the extent that such disclosure is necessary in obtaining information, which is not otherwise reasonably available . . ." Confidentiality is thus required unless the investigative disclosure of certain return information is both (1) necessary and (2) the information sought is not otherwise reasonably available without the disclosure of that return information. For purposes of the confidentiality rule of Section 6103, therefore, the issue regarding the amicus curiae is whether a disclosure that identifies that the taxpayer is under criminal investigation is both necessary to obtain information from witnesses and such information is not otherwise reasonably available from these witnesses without disclosure that the taxpayer is under criminal investigation.

As Judge Brown forcefully noted in his dissent in *Barrett*, there was never any explanation in that case why it was necessary for the agents there who mass circularized letters to the taxpayer's patients to inform them that the taxpayer was under criminal investigation:

> [T]here has been no statement, either from on high in the Solicitor's office or the Department of Justice, or on the lower rungs of the I.R.S. field agents, concerning why it was reasonably necessary to inform the patient interviewees that Dr. Barrett was under criminal investigation. All that the I.R.S. could conceivably want from the inquiry was (i) the amount which the doctor charged the patient for the reconstructive plastic surgery, (iia) the amount that the patient paid, (iib) whether paid in cash or check, and (iii) the amount, if any, paid by an insurer. The fact that Dr. Barrett was facing criminal prosecution and punishment would have nothing to do with those inquiries. In any event, as the revelation was not necessary to obtain information, there is no need to question whether the information was "not otherwise available."

837 F.2d at 1356. It is therefore clear that the unnecessary disclosure of the fact that the taxpayer is under criminal investigation contravenes Section 6103.

The issue presented in this case and in *Barrett* is whether a district court is empowered to enforce an I.R.S. summons conditionally when the facts of a particular case establish the need to prevent further violations of Section 6103's requirement of confidentiality.

The District Court's Role in Summons Enforcement Proceedings

The role of the district court in the enforcement of an I.R.S. summons was initially outlined by this Court in *Reisman v. Caplin*, 375 U.S. 440 (1964). Petitioners in that case, who were the attorneys for the taxpayers under investigation, sought declaratory and injunctive relief against the Service to prevent compliance with a summons issued to an accounting firm employed by

petitioners to assist them in connection with a tax investigation of their clients. It was claimed that the summons improperly demanded production of the attorneys' work product and violated their clients' Fourth, Fifth and Sixth Amendment rights. This Court held that petitioners were not entitled to equitable relief because the statutory scheme created by Congress for the enforcement of an I.R.S. summons provided an "adequate remedy at law." 375 U.S. at 443.

The key elements of this "remedy" are: (1) "both parties summoned and those affected by a disclosure may appear or intervene before the District Court and challenge the summons by asserting their constitutional or other claims"; (2) this same rule applies before a hearing officer, *i.e.* the special agent before whom the summons is initially returnable; (3) an enforcement action filed by the Service "is an adversary proceeding affording a judicial determination of the challenges to the summons and giving complete protection to the witness"; (4) in an I.R.S. summons enforcement proceeding, "the hearing officer has no power of enforcement or right to levy any sanctions"; (5) no penalty may be imposed on a summoned party who appears and interposes good faith challenges to the summons; and (6) "the witness may challenge the summons on any appropriate ground." *Id.* at 445-50.

In sum, the statutory scheme governing enforcement of an I.R.S. summons is valid because it "provides full opportunity for judicial review before any coercive sanctions may be imposed." *Id.* at 450.

The protective function of the district court in summons enforcement proceedings, emphasized in *Reisman v. Caplin*, was underscored in *United States v. Powell*, 379

U.S. 48 (1964), which held that probable cause need not be shown to obtain enforcement of a summons. After discussing the showing required of the Service, this Court stated that such a showing could be nevertheless attacked upon a showing of "abuse of process." As part of its evaluation of whether the summons should be enforced, the district court may "inquire into the underlying reasons for the examination. It is the court's process which is invoked to enforce the administrative summons and a court may not permit its process to be abused." *Id.* at 58.[2]

The potential for abuse of the summons power was again acknowledged in *United States v. Bisceglia*, 420 U.S. 141, 146 (1975) where Chief Justice Burger stated that "We recognize that the authority vested in tax collectors may be abused, as all power is subject to abuse."

The Court again emphasized, however, that the safeguard against such possible abuse is the federal district court which stands between the I.R.S. and the person summoned and which possesses the power to refuse enforcement or *narrow* the scope of the summons:

> Substantial protection is afforded by the provision that an Internal Revenue Service summons can be

2. This Court has not provided a comprehensive definition of "abuse of process." In *Powell*, the Court said: "Such an abuse would take place if the summons had been issued for an improper purpose, such as to harass the taxpayer or to put pressure on him to settle a collateral dispute, or for any other purpose reflecting on the good faith of the particular investigation." 379 U.S. at 58. The decision in *United States v. LaSalle National Bank*, 437 U.S. 298 (1978) suggests that the various statements concerning abuse of process in *Powell* were not meant to be exhaustive: "Future cases may well reveal the need to prevent other forms of agency abuse of congressional authority and judicial process." *Id.* at 318. *Accord: SEC v. ESM Government Securities, Inc.*, 645 F.2d 310, 314 (5th Cir. 1981); *SEC v. Wheeling - Pittsburgh Steel Corp.*, 648 F.2d 118 (3rd Cir. 1981).

enforced only by the courts. 26 U.S.C. § 7604(b); *Reisman v. Caplin*, 375 U.S. 440, 84 S. Ct. 508, 11 L.Ed.2d 459 (1964). Once a summons is challenged it must be scrutinized by a court to determine whether it seeks information relevant to a legitimate investigative purpose and is not meant "to harass the taxpayer or to put pressure on him to settle a collateral dispute, or for any other purpose reflecting on the good faith of the particular investigation." *United States v. Powell*, 379 U.S., at 58, 85 S. Ct., at 255, 13 L.Ed.2d 112. The cases show that the federal courts have taken seriously their obligation to apply this standard to fit particular situations, either by refusing enforcement or narrowing the scope of the summons. See, e.g., *United States v. Matras*, 487 F.2d 1271 (CA 8 1973); *United States v. Theodore*, 479 F.2d 749, 755 (CA 4 1973); *United States v. Pritchard*, 438 F.2d 969 (CA 5 1971); *United States v. Dauphin Deposit Trust Co.*, 385 F.2d 129 (CA 5 1967). Indeed, the District Judge in this case viewed the demands of the summons as too broad and carefully narrowed them.

Id. at 146-147. The Ninth Circuit in the present case correctly applied these settled principles in concluding that the district court had the authority to restrict the I.R.S. from disclosing documents produced in response to the summons to other governmental agencies unless criminal tax prosecution was sought or a further court order was obtained. *United States v. Zolin*, 809 F.2d 1411, 1416-17 (9th Cir. 1987). As the Court of Appeals observed, this restriction, rather than being an abuse of discretion, was a wise exercise of control over its own process, enabling it to monitor the I.R.S.' use of the summoned documents. *Id.*[3]

3. The apparent need for the restriction was expressed in the Court of Appeal's opinion in the related decision in *United States v. Author Services, Inc.*, 804 F.2d 1520, 1526 (9th Cir. 1986) as follows: "The [District] Court believed its order was necessary because of the many levels of ongoing litigation between the Church and the Government which created 'the real fear that information acquired for one purpose may be in effect used for civil discovery in the other.'" The Court of Appeals also noted that "district courts have broad authority, under 26 U.S.C. § 7402(a), to issue any orders or decrees as may be necessary for enforcement of internal revenue laws." *Id.* at 1525.

In *Barrett*, the Fifth Circuit's *en banc* decision expressly denies the existence of any authority which would permit a district court to enforce a summons conditionally or restrict the I.R.S. in what it does or may do with the summoned information. Indeed, the *Barrett* opinion does not acknowledge any power in the district court even to modify or narrow a summons. The Fifth Circuit's language is sweeping and unequivocal:

> In a summons enforcement proceeding, the district court's only task is to determine whether the summons should or should not be enforced. This inquiry is limited to ensuring that the government has complied with the four *Powell* criteria, and that its process is not being abused. *Powell*, 379 U.S. at 57-58, 85 S. Ct. at 255. There is no statutory authority, nor congressional indication that existing statutes supply the authority, nor Supreme Court authority, to allow the district court to make any consideration except whether to enforce or not to enforce the summons. If good faith and a legitimate purpose are found to exist, the summons should be enforced. If they are not present, enforcement should be denied. There is no middle ground because to create that remedy would unduly hamper the investigative efforts of the I.R.S.

837 F.2d at 1350.

Barrett's severe limitation on the scope of the district court's power in summons enforcement proceedings is

a dramatic departure from the settled principle that "the equitable powers of the courts of the United States, sitting as courts of law, over their own process, to prevent abuse, oppression and injustice, are inherent, and as extensive and efficient as may be required by the necessity for their exercise . . ." *Gumbel v. Pitkin,* 124 U.S. 131, 145-46 (1888). The Fifth Circuit's "all or nothing" approach, which denies any "middle ground" in summons enforcement proceedings, is fundamentally at odds with the obligation of the federal courts to apply the *Powell* standard "to fit particular situations" and where necessary, modify a summons to ensure that it serves only legitimate purposes. *Bisceglia, supra,* 420 U.S. at 146. Limiting the district court to enforcing a summons without restriction or denying it in its entirety effectively deprives it of the power to control its own process.

Moreover, the Fifth Circuit's limitation on the district court's power would produce, in some cases, the anomalous result that no information is supplied to the Service because the challenged summons is partially defective, *e.g.* it improperly demands certain information protected from disclosure, *e.g.,* attorney-client communications, *Reisman v. Caplin, supra* 375 U.S. at 449; attorney work product, *Upjohn Co. v. United States,* 449 U.S. 383 (1981); or documents protected by the privilege against self-incrimination, *Fisher v. United States,* 425 U.S. 391 (1976); *United States v. Doe,* 465 U.S. 605 (1984).

The district court cannot effectively discharge its responsibiiity to protect a taxpayer's rights in a summons enforcement proceeding unless it can modify a summons, where necessary, and, based upon the particular facts of the case, "fashion appropriate rules as to the fairness of the enforcement order." *United States v. Friedman,* 532 F.2d 928 (3rd Cir. 1976) (enforcement of summons

may be conditioned on requiring I.R.S. to reimburse summoned third party banks for the reasonable cost of production of the requested bank records). If conditional enforcement is necessary to protect the statutorily guaranteed right of confidentiality, the district court's power and duty to award such relief is no less than its power and duty to protect other rights of taxpayers, such as the attorney-client privilege, work product immunity and the privilege against self-incrimination during summons enforcement proceedings.

Contrary to the Fifth Circuit's conclusion in *Barrett,* conditional enforcement of a summons to protect a taxpayer's rights under Section 6103 would not improperly interfere with the I.R.S.' investigative efforts. There is no reason to believe that summons enforcement proceedings would be unduly burdened if district judges have the power to condition enforcement, when necessary, to protect a taxpayer against unnecessary invasions of his privacy forbidden by Section 6103. The taxpayer would have the burden of demonstrating that conditional enforcement is needed under the particular facts of the case. In the absence of a substantial showing by affidavit or other sworn evidence, *see e.g., United States v. Millman,* 765 F.2d 27 (2d Cir. 1985), that the information sought by the summons is likely to be used in a manner prohibited by Section 6103, or the agents are otherwise likely to act in violation of the statute, conditional enforcement would not be authorized.

Furthermore, as noted in Judge Brown's dissent in *Barrett,* much of the evidence relevant to the determination of whether a summons has a legitimate investigative purpose is likely to be pertinent to the determination of whether the disclosure of return information is neces-

sary to obtain information that is otherwise not reasonably available. 837 F.2d at 1356-57. Evidentiary hearings are not granted automatically in summons enforcement proceedings; their infrequent number is not likely to increase substantially if conditional enforcement is recognized as an appropriate judicial tool in such cases.

In those few cases where conditional enforcement is shown to be necessary, it is unlikely that substantial judicial resources would have to be devoted to ensuring compliance by the Service with the order. But if a compliance hearing should occasionally be needed, respect for the court's process and Congress' unequivocal intent to protect taxpayer confidentiality are sufficient reasons to warrant the expenditure of these resources.

A conditional enforcement order would not impede I.R.S. investigative efforts because the summoned documents obtained under a conditional enforcement order could be used by the Service for any purpose permitted under the law. Such an order would not forbid even the mass circularization of the taxpayer's clients, patients or customers where the investigation demonstrates the need to employ that information gathering technique. Conditional enforcement, however, would prevent the unnecessary mass disclosure during an investigation that the taxpayer is under criminal investigation, a privacy right guaranteed by statute.

Unquestionably, Congress intended to deter unnecessary disclosures of confidential information by providing for criminal prosecution of the offending party and a civil damage remedy against the government for an aggrieved taxpayer. However, nothing in Sections 7213 or 7431 suggests that these statutes were intended to deprive the district court of its inherent power and its statutory

authority to prevent abuse of its process when there is a demonstrable threat that the Service intends to pursue its investigation in a manner incompatible with Section 6103.

The government incorrectly argues that Congress did not intend a pre-disclosure remedy for disclosures that would violate Section 6103(k)(6) because of the post-disclosure sanctions of Sections 7431 and 7213 and the pre-disclosure remedy of Section 6110(f)(3). (Govt's brief, p. 34-35.) The government fails to recognize that Section 7431(d) contemplates that a taxpayer will not learn of an illegal investigative disclosure until after it occurs and, therefore, provides a two (2) year limitation period for bringing the civil action under Section 7431 "after the date of discovery by the plaintiff of the unauthorized disclosure." In the entirely different situation of publishing a private letter ruling, where the Service is required to notify the taxpayer in advance of its proposed disclosure, the taxpayer has the right to a pre-disclosure remedy. Section 6110(f)(1), (2), and (3). Therefore, where a taxpayer is fortunate enough to learn in advance of the Service's proposed illegal disclosures during an administrative investigation, such as in *Barrett* and *Zolin*, Congress did not contemplate that a taxpayer would not have a pre-disclosure remedy.

Especially where, as in *Barrett*, the Service seeks a federal district court's order enforcing its summons for the purpose of obtaining information that will allow it to continue making illegal disclosures via mass circularization letters, Congress did not intend that the federal district court would not have the authority to prevent an abuse of its process and the commission of a felony by an employee of the I.R.S. under section 7213. The

government's characterization of Section 7213 as merely a post-disclosure remedy ignores the fact that it expresses Congress' intent that investigative disclosures in violation of Section 6103 constitute criminal felony conduct and Congress clearly did not intend that federal district courts would not have the power to prevent I.R.S. employees from committing such crimes. Recognition of the power in the district court to prevent such crimes is fully consistent with the congressional goal of strengthening taxpayers' confidentiality rights that the Tax Reform Act of 1976 so clearly attempted to accomplish.

The existence of a conditional enforcement order, supported by the district court's power to impose contempt sanctions for its violation, would serve to ensure compliance by the Service with the law which it is obliged to administer faithfully, in circumstances where the facts demonstrate the need for this special condition. The power of the district court to condition its enforcement order is likely to be far more effective in preventing infringement of the right of confidentiality guaranteed by Section 6103 than the prospect of a civil damage action under Section 7431, which may not always fully compensate the loss resulting from the improper disclosure and breach of confidentiality. As Judge Brown noted in his dissent in *Barrett*:

> Even more than litigious frustration, the damage remedy—no matter how extravagant the damage award—cannot undo the harm wrought by the illegal disclosure. Here, revealing that the doctor is under criminal investigation is of irreparable damage to his personal and professional reputation. Congress, in furtherance of its goal of strengthening the rights of taxpayers, intended that taxpayers should not be exposed to such damning, untried, unproved accusations.

United States v. Barrett, supra, 837 F.2d at 1357.

This Court's decision in *Fuentes v. Shevin,* 407 U.S. 67, 81 (1972) establishes that due process requires a hearing before the government may act to deprive a person of his property and that such a hearing "must be granted at a time when the deprivation can still be prevented." Even though damages may later be awarded for the wrongful deprivation, "no damage award can undo the fact that the arbitrary taking that was subject to the right of procedural due process has already occurred." *Id.* at 82. As the Court of Appeals for the District of Columbia has said, a "damage remedy *after* the information is released fails to protect [the] right to confidentiality." *Tierney v. Schweiker,* 718 F.2d 449, 457 (D.C. Cir. 1983) (emphasis in original).

Furthermore, granting a pre-disclosure remedy to taxpayers in the form of a conditional enforcement order would serve to reduce the government's exposure to unnecessary liability for damages,[4] reduce the cost of litigation to the government and to taxpayers and reduce the burden on the federal court system of actions brought under Section 7431.

This Court has not been inclined to impose restraints on the breadth of the Service's summons authority granted by Congress " 'absent unambiguous directions from Congress.' " *United States v. Arthur Young & Co.,*

4. The amount of minimum liquidated damages under Section 7431 of $1,000 per disclosure alone can result in substantial damages. In *Barrett*, for example, the special agent mailed at least 350 separate letters to the taxpayer's patients, thereby exposing the public treasury to a minimum of $350,000 in damages.

465 U.S. 805, 816 (1984) (quoting *United States v. Bisceglia*, 420 U.S. 141, 150 (1975)); *United States v. Euge*, 444 U.S. 707, 715 (1980). The Tax Reform Act of 1976, which enacted a stringent code of confidentiality and Section 6103(k)(6), are precisely such "unambiguous directions from Congress" that justify recognition of a district court's power to enforce a summons conditionally when the circumstances warrant such relief.

CONCLUSION

In view of the foregoing, the amicus curiae submits that this Court, in deciding the present case and *Barrett*, should hold that a federal district court has the power to enforce an I.R.S. summons conditionally in order to prevent violation of a taxpayer's confidentiality rights under Section 6103.

Respectfully submitted,

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APPENDIX

INTERNAL REVENUE MANUAL — Administration

INVESTIGATIVE PROCEDURE

P-9-29 (Approved 7-24-79)

Investigative policy

All criminal investigations should be started and concluded as expeditiously as possible. They should be conducted impartially and thoroughly to obtain all critical information and evidence. Duplication in investigations, unnecessary inconveniences to the public and unnecessary embarrassment to the taxpayer should be avoided. Appropriate courtesies should be shown when soliciting information.

All investigations should be terminated when sufficient evidence to convict has been accumulated and there are no reasonable grounds to expect that further investigation may produce significant results in relation to the available evidence and to the additional investigative time and effort involved. All who are implicated in a crime will be sought out and definitive evidence obtained as to their implication, to the extent reasonable. Investigations of lesser prosecution potential should be closed when effective use of resources requires that the staffing to complete such cases should be applied to other cases having greater potential to enhance voluntary compliance.

P-9-35 (Approved 9-3-87)

Legal rights of persons investigated to be observed

The Internal Revenue Service is charged with responsibility for administering internal revenue laws with uniform

fairness and impartiality. A vigorous enforcement effort is necessary to bring to justice willful offenders of tax laws. At the same time, the integrity of Service personnel in respecting and observing the constitutional and other legal rights of all persons being investigated must be maintained. The methods which the Service will use in investigating alleged violations of law may vary with the circumstances, but will in all respects stay within the bounds of the law.

9382 (2-22-77)

Conduct Standards for Special Agent During Investigations

9382.1 (2-8-79)

General

(1) *Impartial*—A special agent should be impartial in all investigations conducted. He/she must not be influenced by political, racial, or religious considerations. He/she should avoid a mental attitude of attempting to "get" persons who are under investigation. He/she must so conduct himself/herself as to make it apparent to all persons connected with the case that his/her investigation is completely impartial.

(2) *Thorough*—A special agent should be thorough in all investigations conducted. It is his/her duty to obtain all the pertinent facts, both favorable and adverse, regardless of the conclusions that may be later formed from consideration of them. He/she should exercise initiative and zeal, but should avoid the appearance, in either action or speech, of being overzealous.

(3) *Tactful*—A special agent should be tactful in all investigations conducted. He/she must avoid making any remarks or acts during or following the investigation which are likely to be misinterpreted.

(4) *Discreet*—A special agent should be discreet in all investigations conducted. He/she must not make statements or ask questions that will divulge information which would tend to jeopardize the successful conclusion of the investigation. He/she must not unnecessarily injure the reputation of the person being investigated.

(5) *Official Rules of Conduct*—The minimum standards of conduct for employees of IRS published in Chapter 735, Treasury Personnel Manual, and in IRM 0735.1, Handbook of Employee Responsibilities and Conduct, contain additional guidelines for the conduct of official Government business which must be scrupulously observed by special agents.

(6) *Report Urgent Developments*—Each special agent will immediately notify his/her group manager (or, when the group manager is not available, the next highest official available) of any unusual developments or situations that occur during the course of an investigation during regular or irregular duty hours, such as participation in any investigative activity with other enforcement agencies. (see 9451.2:(3)) Group managers should be notified in advance of taking any action since legal issues may be involved which management officials may wish to discuss with Counsel before any actions are taken.

347 (1-18-80)

Circular Form Letter

347.1 (9-8-80)

General

Mail circularization is a written request to third parties for information where more than ten letters of a similar

nature are sent. Mail circularization to obtain third party evidence may be, under certain circumstances, the most practical means of obtaining documentary evidence in an investigation when a large number of persons, widely scattered geographically, need to be reached. If not judiciously used, mail circularization may result in unwarranted embarrassment to the taxpayer or cause unfavorable public reaction, thus subjecting the Service to criticism.

347.2 (7-7-88)

Procedure

To ensure proper use of this technique, mail circularization will not be undertaken in any case without the prior approval of the Chief, Criminal Investigation Division, including approval of the letters to be sent out. Care must be exercised in approving mail circularization to ensure that mail inquiries are sent only to those third parties who, in the view of the Chief, Criminal Investigation Division, are a likely source of information; the information sought is important to the investigation; and obtaining the information by other means, if at all possible, would not be practical because of either delays in investigation, costs involved, or similar reasons. Caution must be exercised not to damage the reputation of the taxpayer by making the letter either offensive or suggestive of any wrongdoing by the taxpayer. It *must not* be disclosed in the body of the letter that the taxpayer is under investigation by the Criminal Investigation Division. Appropriate wording could be "The Internal Revenue Service is conducting an investigation of . . .". Any reference to the Criminal Investigation Division must be restricted to the signature blocks or ancillary

headings. When mailing circularizations, all such letters will be signed by the special agent with prior approval of the Chief, Criminal Investigation Division, indicated on the file copy. The title "Special Agent" and Criminal Investigation Division will be included in the signature block.

347.2 (9-8-80)

Procedure

To ensure proper use of this technique, mail circularization will not be undertaken in any case without the prior approval of the Chief, Criminal Investigation Division, including approval of the letters to be sent out. Care must be exercised in approving mail circularization to ensure that mail inquiries are sent only to those third parties who, in the view of the Chief, Criminal Investigation Division, are a likely source of information; the information sought is important to the investigation; and obtaining the information by other means, if at all possible, would not be practical because of either delays in investigation, costs involved, or similar reasons. Caution must be exercised not to damage the reputation of the taxpayer by making the letter either offensive or suggestive of any wrongdoing by the taxpayer. Appropriate wording could be "The Internal Revenue Service is conducting an investigation of . . .". When mailing circularizations, all such letters will be signed by the special agent with prior approval of the Chief, Criminal Investigation Division, indicated on the file copy. The title "Special Agent" and Criminal Investigation Division will be included in the signature block.

348 (1-18-80)

Disclosure

348.1 (1-17-83)

General

All returns and return information are confidential and may not be disclosed except as authorized by the Internal Revenue Code. This rule applies to all present and former IRS employees. Civil and criminal sanctions may be imposed upon intentional violators. Effective with respect to disclosures made after September 3, 1982, civil actions for damages are permitted against the Government rather than against the employee.

348.2 (4-9-84)

Disclosure Definitions

(1) A "return" is any tax return or information return, schedules, and attachments thereto, including any amendment or supplement, which is required or permitted to be filed and is in fact filed by a taxpayer with the Secretary of the Treasury. Examples include:

(a) Forms 1040, Schedules A, B, C and Forms W-2.

(b) A taxpayer has filed an income tax return and subsequently submits a letter to IRS explaining an item on the original return. The letter is within the definition of return.

(2) The statutory definition of "return information" is very broad. It includes any information other than a taxpayer's return itself which IRS has obtained from any source or developed through any means which relates

to the potential liability of any person under the Code for any tax, penalty, interest, fine, forfeiture or other imposition or offense. It includes information extracted from a return, e.g., the names of dependents, locations of business interests, bank accounts, etc. Examples include:

(a) The fact that a person has filed a return or is under investigation is recorded in IRS files.

(b) The fact that the Service has copies of public records maintained in its files which were secured from a county clerk's office pursuant to an investigation of a taxpayer.

(3) "Taxpayer return information" is return information which is filed with or furnished to the IRS by or on behalf of the taxpayer to whom the return information relates. This includes, for example, data supplied by a taxpayer's representative (e.g., his accountant) to the IRS in connection with an audit of his return.

(4) Disclosure is the making known of returns or return information in any manner. A disclosure may be either direct or indirect. Discussing specific facts of a case you are working on with your supervisor is a disclosure although clearly a proper one.

(5) Tax Administration includes the enforcement of not only the Internal Revenue Laws, but also the enforcement of other related Federal Statutes where such enforcement is done in connection with the administration of tax laws.

348.3 (1-18-80)

Disclosures for Investigative Purposes

Special agents are specifically authorized by IRC 6103(k)(6) to disclose return information to the extent necessary to gather data which may be relevant to a tax investigation. Situations in which special agents may have to make such disclosures in order to perform their duties arise on a daily basis. For example, this occurs whenever they contact third parties believed to have information pertinent to a tax investigation. IRC 6103(k)(6) permits the disclosure of return information in the investigation process but does not authorize the disclosure of returns themselves. They may be disclosed during the investigation process only to their preparer. When soliciting information from a third party other than a return preparer during a tax investigation, a special agent may not show a taxpayer's tax return to the third party. However, pertinent data (e.g., the nature and amount of income, deductions, expenses, etc.) may be extracted from the tax return and used in questions to third parties.

INTERNAL REVENUE CODE

The subsections of I.R.C. § 6103 relevant to this Petition are 6103(a), 6103(b), and 6103(k)(6) are set forth below:

Sec. 6103. *Confidentiality and Disclosure of Returns and Return Information.*

[Sec. 6103(a)]

(a) GENERAL RULE.—Returns and return information shall be confidential and except as authorized by this title—

(1) no officer or employee of the United States,

(2) no officer or employee of any State, any local child support enforcement agency, or any local agency administering a program listed in subsection (1)(7)(D) who has or had access to returns or return information under this section, and

(3) no other person (or officer or employee thereof) who has or had access to returns or return information under subsection (e)(1)(D)(iii), paragraph (2) or (4)(B) of subsection (m), or subsection (n),

shall disclose any return or return information obtained by him in any manner in connection with his service as such an officer or an employee or otherwise or under the provisions of this section. For purposes of this subsection the term "officer or employee" includes a former officer or employee.

[Sec. 6103(b)]

(b) DEFINITIONS.—For purposes of this section—

(1) RETURN.—The term "return" means any tax or information return, declaration of estimated tax, or claim for refund required by, or provided for or permitted under, the provisions of this title which is filed with the Secretary by, on behalf of, or with respect to any person, and any amendment or supplement thereto, including supporting schedules, attachments, or lists which are supplemental to, or part of, the return so filed.

(2) RETURN INFORMATION.—The term "return information" means—

(A) a taxpayer's identity, the nature, source, or amount of his income, payments, receipts, deductions, exemptions, credits, assets, liabilities, net worth, tax liability, tax withheld, deficiencies, overassessments, or tax payments, whether the taxpayer's return was, is being, or will be examined or subject to other investigation or processing, or any other data, received by, recorded by, prepared by, furnished to, or collected by the Secretary with respect to a return or with respect to the determination of the existence, or possible existence, of liability (or the amount thereof) of any person under this title for any tax, penalty, interest, fine, forfeiture, or other imposition, or offense, and

(B) any part of any written determination or any background file document relating to such written determination (as such terms are defined

in section 6110(b)) which is not open to public inspection under section 6110,

but such term does not include data in a form which cannot be associated with, or otherwise identify, directly or indirectly, a particular taxpayer. Nothing in the preceding sentence, or in any other provision of law, shall be construed to require the disclosure of standards used or to be used for the selection of returns for examination, or data used or to be used for determining such standards, if the Secretary determines that such disclosure will seriously impair assessment, collection, or enforcement under the internal revenue laws.

(3) TAXPAYER RETURN INFORMATION.—The term "taxpayer return information" means return information as defined in paragraph (2) which is filed with, or furnished to, the Secretary by or on behalf of the taxpayer to whom such return information relates.

(4) TAX ADMINISTRATION.—The term "tax administration"—

(A) means—

(i) the administration, management, conduct, direction, and supervision of the execution and application of the internal revenue laws or related statutes (or equivalent laws and statutes of a State) and tax conventions to which the United States is a party, and

(ii) the development and formulation of Federal tax policy relating to existing or pro-

posed internal revenue laws, related statutes, and tax conventions, and

(B) includes assessment, collection, enforcement, litigation, publication, and statistical gathering functions under such laws, statutes, or conventions.

(5) STATE.—The term "State" means—

(A) any of the 50 States, the District of Columbia, the Commonwealth of Puerto Rico, the Virgin Islands, the Canal Zone, Guam, American Samoa, the Commonwealth of the Northern Mariana Islands, the Republic of the Marshall Islands, the Federated States of Micronesia, and the Republic of Palau, and

(B) for purposes of subsection (a)(2), (b)(4), (d)(1), (h)(4), and (p) any municipality—

(i) with a population in excess of 2,000,000 (as determined under the most recent decennial United States census data available),

(ii) which imposes a tax on income or wages, and

(iii) with which the Secretary (in his sole discretion) has entered into an agreement regarding disclosure.

(6) TAXPAYER IDENTITY.—The term "taxpayer identity" means the name of a person with respect to whom a return is filed, his mailing address, his taxpayer identifying number (as described in section 6109), or a combination thereof.

(7) INSPECTION.—The terms "inspected" and "inspection" mean any examination of a return or return information.

(8) DISCLOSURE.—The term "disclosure" means the making known to any person in any manner whatever a return or return information.

(9) FEDERAL AGENCY.—The term "Federal agency" means an agency within the meaning of section 551(1) of title 5, United States Code.

(10) CHIEF EXECUTIVE OFFICER.—The term "chief executive officer" means, with respect to any municipality, any elected official and the chief official (even if not elected) of such municipality.

[Sec. 6103(k)]

(k) DISCLOSURE OF CERTAIN RETURNS AND RETURN INFORMATION FOR TAX ADMINISTRATION PURPOSES.—

(6) DISCLOSURE BY INTERNAL REVENUE OFFICERS AND EMPLOYEES FOR INVESTIGATIVE PURPOSES.—An internal revenue officer or employee may, in connection with his official duties relating to any audit, collection activity, or civil or criminal tax investigation or any other offense under the internal revenue laws, disclose return information to the extent that such disclosure is necessary in obtaining information, which is not otherwise reasonably available, with respect to the correct determination of tax, liability for tax, or the amount to be collected or with respect to the enforcement of any other provision of this title. Such disclosures shall be made only in such situations and under such conditions as the Secretary may prescribe by regulation.

[Sec. 7213]

Sec. 7213. *Unauthorized Disclosure of Information.*

[Sec. 7213(a)]

(a) RETURNS AND RETURN INFORMATION.—

(1) FEDERAL EMPLOYEES AND OTHER PERSONS.—It shall be unlawful for any officer or employee of the United States or any person described in section 6103(n) (or an officer or employee of any such person), or any former officer or employee, willfully to disclose to any person, except as authorized in this title, any return or return information (as defined in section 6103(b)). Any violation of this paragraph shall be a felony punishable upon conviction by a fine in any amount not exceeding $5,000, or imprisonment of not more than 5 years, or both, together with the costs of prosecution, and if such offense is committed by any officer or employee of the United States, he shall, in addition to any other punishment, be dismissed from office or discharged from employment upon conviction for such offense.

(2) STATE AND OTHER EMPLOYEES.—It shall be unlawful for any person (not described in paragraph (1)) willfully to disclose to any person, except as authorized in this title, any return or return information (as defined in section 6103(b)) acquired by him or another person under subsection (d), (i)(3)(B)(i), (l)(6), (7), (8), (9), (10), or (11), or (m)(2) or (4) of section 6103. Any violation of this paragraph shall be a felony punishable by a fine in any amount not exceeding $5,000, or

imprisonment of not more than 5 years, or both, together with the costs of prosecution.

(3) OTHER PERSONS.—It shall be unlawful for any person to whom any return or return informaiton (as defined in section 6103(b)) is disclosed in any manner unauthorized by this title thereafter willfully to print or publish in any manner not provided by law any such return or return information. Any violation of the paragraph shall be a felony punishable by a fine in any amount not exceeding $5,000, or imprisonment of not more than 5 years, or both, together with the costs of prosecution.

(4) SOLICITATION.—It shall be unlawful for any person willfully to offer any item of material value in exchange for any return or return information (as defined in section 6103(b)) and to receive as a result of such solicitation any such return or return information. Any violation of this paragraph shall be a felony punishable by a fine in any amount not exceeding $5,000, or imprisonment of not more than 5 years, or both, together with the costs of prosecution.

(5) SHAREHOLDERS.—It shall be unlawful for any person to whom a return or return information (as defined in section 6103(b)) is disclosed pursuant to the provisions of section 6103(e)(1)(D)(iii) willfully to disclose such return or return information in any manner not provided by law. Any violation of this paragraph shall be a felony punishable by a fine in any amount not to exceed $5,000, or imprisonment of not more than 5 years, or both, together with the costs of prosecution.

[Sec. 7213(b)]

(b) DISCLOSURE OF OPERATIONS OF MANUFACTURER OR PRODUCER.—Any officer or employee of the United States who divulges or makes known in any manner whatever not provided by law to any person the operations, style of work, or apparatus of any manufacturer or producer visited by him in the discharge of his official duties shall be guilty of a misdemeanor and, upon conviction thereof, shall be fined not more than $1,000, or imprisoned not more than 1 year, or both, together with the costs of prosecution; and the offender shall be dismissed from office or discharged from employment.

[Sec. 7213(c)]

(c) DISCLOSURES BY CERTAIN DELEGATES OF SECRETARY.—All provisions of law relating to the disclosure of information, and all provisions of law relating to penalties for unauthorized disclosure of information, which are applicable in respect of any function under this title when performed by an officer or employee of the Treasury Department are likewise applicable in respect of such function when performed by any person who is a "delegate" within the meaning of section 7701(a)(12)(B).

[Sec. 7213(d)]

(d) CROSS REFERENCES.—

(1) PENALTIES FOR DISCLOSURE OF INFORMATION BY PREPARERS OF RETURNS.—For penalty for disclosure or use of information by preparers of returns, see section 7216.

(2) PENALTIES FOR DISCLOSURE OF CONFIDENTIAL INFORMATION.—

For penalties for disclosure of confidential information by any officer or employee of the United States or any department or agency thereof, see 18 U.S.C. 1905.

JURISDICTION OF DISTRICT COURTS

[Sec. 7402]

Sec. 7402. (a) TO ISSUE ORDERS, PROCESSES, AND JUDGMENTS.—The district courts of the United States at the instance of the United States shall have such jurisdiction to make and issue in civil actions, writs and orders of injunction, and of *ne exeat republica*, orders appointing receivers, and such other orders and processes, and to render such judgments and decrees as may be necessary or appropriate for the enforcement of the internal revenue laws. The remedies hereby provided are in addition to and not exclusive of any and all other remedies of the United States in such courts or otherwise to enforce such laws.

(b) TO ENFORCE SUMMONS.—If any person is summoned under the internal revenue laws to appear, to testify, or to produce books, papers, or other data, the district court of the United States for the district in which such person resides or may be found shall have jurisdiction by appropriate process to compel such attendance, testimony, or production of books, papers, or other data.

(c) FOR DAMAGES TO UNITED STATES OFFICERS OR EMPLOYEES.—Any officer or employee of the United States acting under authority of this title, or any person acting under or by authority of any such officer or em-

ployee, receiving any injury to his person or property in the discharge of his duty shall be entitled to maintain an action for damages therefor, in the district court of the United States, in the district wherein the party doing the injury may reside or shall be found.

(d) [Repealed by P.L. 92-310]

(e) TO QUIET TITLE.—The United States district courts shall have jurisdiction of any action brought by the United States to quiet title to property if the title claimed by the United States to such property was derived from enforcement of a lien under this title.

(f) GENERAL JURISDICTION.—

For general jurisdiction of the district courts of the United States in civil actions involving internal revenue, see section 1340 of Title 28 of the United States Code.

[Sec. 7431]

Sec. 7431. *Civil Damages for Unauthorized Disclosure of Returns and Return Information.*

[Sec. 7431(a)]

(a) IN GENERAL.—

(1) DISCLOSURE BY EMPLOYEE OF UNITED STATES. —If any officer or employee of the United States knowingly, or by reason of negligence, discloses any return or return information with respect to a taxpayer in violation of any provision of section 6103, such taxpayer may bring a civil action for damages against the United States in a district court of the United States.

(2) DISCLOSURE BY A PERSON WHO IS NOT AN EMPLOYEE OF UNITED STATES.—If any person who is not an officer or employee of the United States knowingly, or by reason of negligence, discloses any return or return information with respect to a taxpayer in violation of any provision of section 6103, such taxpayer may bring a civil action for damages against such person in a district court of the United States.

[Sec. 7431(b)]

(b) NO LIABILITY FOR GOOD FAITH BUT ERRONEOUS INTERPRETATION.—No liability shall arise under this section with respect to any disclosure which results from a good faith, but erroneous, interpretation of section 6103.

[Sec. 7431(c)]

(c) DAMAGES.—In any action brought under subsection (a), upon a finding of liability on the part of the defendant, the defendant shall be liable to the plaintiff in an amount equal to the sum of—

(1) the greater of—

(A) $1,000 for each act or unauthorized disclosure of a return or return information with respect to which such defendant is found liable, or

(B) the sum of—

(i) the actual damages sustained by the plaintiff as a result of such unauthorized disclosure, plus

(ii) in the case of a willful disclosure or a disclosure which is the result of gross negligence, punitive damages, plus

(2) the cost of the action.

[Sec. 7431(d)]

(d) PERIOD FOR BRINGING ACTION.—Notwithstanding any other provision of law, an action to enforce any liability created under this section may be brought, without regard to the amount in controversy, at any time within 2 years after the date of discovery by the plaintiff of the unauthorized disclosure.

[Sec. 7431(e)]

(e) RETURN; RETURN INFORMATION.—For purposes of this section, the terms "return" and "return information" have the respective meanings given such terms in section 6103(b).

[Sec. 7431(f)]

(f) EXTENSION TO INFORMATION OBTAINED UNDER SECTION 3406.—For purposes of this section—

(1) any information obtained under section 3406 (including information with respect to any payee certification failure under subsection (d) thereof) shall be treated as return information, and

(2) any use of such information other than for purposes of meeting any requirement under section 3406 or (subject to the safeguards set forth in section 6103) for purposes permitted under section 6103 shall be treated as a violation of section 6103.

For purposes of subsection (b), the reference to section 6103 shall be treated as including a reference to section 3406.